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Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES
October Term, 2000

JACQUELINE WATSON,
Petitioner,
v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY t/a SEPTA,
Respondent.

On Petition For A Writ Of Certiorari to the
United States Court Of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the "motivating factor" standard of proof set forth in Section 107(a) of the Civil Rights Act of 1991 [42 U.S.C. § 2000e-2(m)] apply to both pretext and mixed-motive disparate treatment discrimination cases brought pursuant to Title VII of the Civil Rights Act of 1964?

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PETITION FOR WRIT OF CERTIORARI

Jacqueline Watson respectfully prays that a writ of certiorari issue from this Honorable Court to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this action on March 20, 2000, and to resolve the division among the circuit courts of appeal regarding whether the motivating factor standard of proof set forth in Section 107(a) of the Civil Rights Act of 1991 [42 U.S.C. §2000e-2(m)] applies to both pretext and mixed-motive disparate treatment discrimination cases brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq*.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is reported at 207 F.3d 207 (3d Cir. 2000). This decision is attached to this Petition as Appendix A. Attached as Appendix C is the Order filed by the Court of Appeals on August 31, 2000, denying petitioners Petition for Rehearing and Suggestion for Rehearing *En Banc*. The August 26, 1998 Memorandum and Order of the District Court for the Eastern District of Pennsylvania, reported at 1998 U.S. Dist. LEXIS 14390, is attached to this Petition as Appendix B.

JURISDICTION

The District Court, which had jurisdiction over the subject matter of this gender and disability discrimination case pursuant to the provisions of 28 U.S.C. § 1331, entered judgment for Respondent Southeastern Pennsylvania Transportation Authority on the jury verdict on August 26, 1998. A timely appeal was taken by Petitioner, Jacqueline Watson, to the United States District Court of Appeals for the Third Circuit. The Court of Appeals affirmed the district court's decision by Order and Opinion of March 20, 2000. A timely filed Petition for Rehearing and Suggestion for Rehearing was denied by

the Court of Appeals on August 31, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 107(a) of the Civil Rights Act of 1991, P.L. 102-166, codified at 42 U.S.C. §2000e-2(m) provides:

> (m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this title [42 USCS § § 2000e, et seq.], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

STATEMENT OF THE CASE

Jacqueline Watson ("Watson") began employment with the Southeastern Pennsylvania Transportation Authority ("SEPTA") as a General Helper in 1983 and was then employed as a dispatcher from 1985 to 1986, until Edward Matthews ("Matthews"), the general foreman of the track shop and utility operations, removed her from that position and replaced her with a male employee. In October, 1988, Watson bid and was selected for the position of Heavy Equipment Operator and became (and continues to be) the only woman ever employed by SEPTA as a Heavy Equipment Operator. From 1989, Watson also served as the "fill in" backfield foreman at the Midvale Yard, supervising the men at that location, assigning jobs, pricing replacement equipment, and scheduling overtime.

On February 12, 1990, Watson was seriously injured while operating a fuel skid truck. In May, 1990, she resumed work in an "unofficial light duty" position as backfield foreman at the Midvale Yard and, in January, 1991, assumed general yard duties in addition to her other "light duties" as foreman.

In late 1992, Matthews (who through the time of his deposition on October 16, 1996 had never hired a female as a track employee), was appointed head of the Track Utility Section and again became Watson's supervisor. Shortly thereafter, on February 4, 1993, Matthews, without cause, removed Watson from her duties at the Midvale Yard and assigned her to secretarial/clerical duties at a different location. Her former duties were assumed by male employees. When she was referred to by her new immediate supervisor as "my girl", and told "clerical work was better for [her]", Watson complained to SEPTA management that she was being treated unfairly because she was a female in a predominantly male workplace.

On July 6, 1994, Matthews informed Watson that SEPTA's medical department had approved her return to her former position as a construction equipment operator. Instead of returning her to that

position, however, Matthews assigned her to a position as a mail run driver (which position required heavy lifting and continuous driving, placing great stress on her injured back) and mandated that she exceed the lifting and sitting limits imposed by her physicians. Told that no other positions were available, Watson accepted the assignment but, as anticipated, suffered severe back pain when she was denied the appropriate accommodation permitted to male employees who had been injured. Immediately following her complaint of back pain, she was placed on indefinite unpaid leave.

On February 9, 1996, Watson filed an action in the United States District Court for the Eastern District of Pennsylvania charging gender and disability discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, *et seq.* (1994). At trial, the district court refused Watson's request that the jury be informed that she should prevail if she had demonstrated that employer's discriminatory intent was, as the Civil Rights Act of 1991 mandates, "a motivating factor" in its adverse decisions regarding her employment. The trial court instead instructed the jury that Watson must show that discrimination was "the determinative factor" in the employer's decisions, a much more difficult "but for" standard. On June 22, 1998, the jury returned a verdict in favor of SEPTA and Watson filed a motion for a new trial based on the district court's jury instructions. That motion was denied on August 26, 1998. Watson then filed a timely appeal to the United States Court of Appeals for the Third Circuit, and that court affirmed the lower court judgment by Order and Opinion of March 20, 2000. A Petition for Rehearing and a Suggestion for Rehearing *En Banc* was timely filed and denied by Order of August 31, 2000.

The question presented here is whether the "motivating factor" standard of proof set forth in Section 107(a) of the Civil Rights Act of 1991 [42 U.S.C. §2000e-2(m)] applies to both pretext and mixed-motive disparate treatment discrimination cases brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*

REASONS FOR ALLOWANCE OF THE WRIT

I. INTRODUCTION

On appeal to the United States Court of Appeals for the Third Circuit, Watson argued that following the enactment of Section 107 of the Civil Rights Act of 1991, Publ. 102-166, 105 Stat. 1071 (1991), the Magistrate Judge was required to instruct the jury that Watson was only obligated to prove that her gender was a "motivating factor" in SEPTA's adverse employment actions against her. The panel of the United States Court of Appeals ("Panel") held that the clear language of that Act had not effected a change in a plaintiff/employee's burden of proof in a "pretext" discrimination case from that which applied prior to its passage (i.e., a plaintiff must prove that the employer's discriminatory intent was a "determining factor" or a "but for" reason for the action taken against the employee). In reaching this conclusion, the Court of Appeals violated fundamental principles of statutory construction, ignored the articulated goals of the amendments, and improperly relied upon questionable legal authority of the Fourth Circuit discussion in *Fuller v. Phipps*, 67 F.3d 1137 (4th Cir. 1996) as well as a misinterpretation of the Second Circuit's decision in *Fields v. New York State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116 (2d Cir. 1997). The decision of the Third Circuit is also contrary to the expressed positions of the First, Seventh, Eighth, Ninth and Eleventh Circuits. It is respectfully suggested that these conflicts on such an important and controlling issue must be resolved.

II. DISCUSSION

A. The 1991 Amendments to the Civil Rights Act of 1964 Created a Singular Causation Standard ("Motivating Factor") for Both Pretext And Mixed-motive Disparate Treatment Cases.

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, sex, color, religion, and national origin. 42 U.S.C. § 2000e-2. The Civil Rights Act of 1991 made several changes to existing disparate treatment jurisprudence; first, it authorized damages, both consequential and punitive, in all disparate treatment cases [42 U.S.C. § 1981a(a)]; second, it declared that a plaintiff in a disparate treatment claim for damages is entitled to a jury trial [42 U.S.C. § 1981a(c)]; and finally, it overruled, in part, *Price Waterhouse v. Hopkins*, 490 U.S.228 (1989) amending Title VII by adding sections 703(m) [42 U.S.C. §2000e-2(m)] and 706(g)(2)(B) [42 U.S.C. §2000e-5(g)(2)(B)]:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Section 701(m), 42 U.S.C. 2000e-2(m) (emphasis supplied).

> On a claim in which an individual proves a violation under section 703(m) of this title and a respondent demonstrates that the respondent would have taken the same

> action in the absence of the impermissible motivating factor, the court -
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorneys' fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

Section 706(g)(2)(B), 42 U.S.C. § 2000e-5(g)(2)(B).

According to these provisions, under section 703(m) of Title VII, an employer is liable if an employee can prove that her protected group status played a motivating part in the adverse employment decision made by her employer. Then, under section 706(g)(2)(B), if the employer can prove by a preponderance of the evidence that it would have made the same decision absent the impermissible factor, the employee's remedy is limited to declaratory or injunctive relief and attorneys' fees and costs. The method instituted by the 1991 Act is more favorable to employee plaintiffs than the *Price Waterhouse* "mixed-motive" method because it allows the employee to prevail even if the employer can prove that it would have made the same employment decision in the absence of the illegal motivating factor, *i.e.*, in order to prevail, an employee need not prove that the employer's reliance on an impermissible factor was the "but for" cause of the adverse employment decision.

B. There Is a Clear Split of Authority on this Issue Among the Circuit Courts of Appeal.

This Court has not addressed the question of whether section 107 of the Act applies to all individual disparate treatment claims under Title VII or only to those in which an employee presents "direct" evidence as Justice O'Connor required in the splintered decision in *Price Waterhouse*. Current circuit court interpretation of the Act is far from consistent[1].

The Third and Fourth Circuits appear to have decided that the 1991 Act merely modified the method of proof described in *Price Waterhouse* and that the "direct" evidence requirement as articulated by Justice O'Connor in her concurrence in *Price Waterhouse* determines when section 107 applies. *See, Watson v.* SEPTA, 207

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[2] *See* T. Green, "Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII" 87 Calif.L.Rev. 983, 995-96 (1999) (collecting cases and discussing approaches)

> There are two key debates at play in the federal courts. The first is whether Congress erased the distinction between a "pretext" and a "mixed-motive" case pursuant to §§ 107(a) and 107(b) of the Civil Rights Act of 1991. This debate is exemplified by contrasting decisions of the Fourth and Seventh Circuits, decided within a few weeks of each other. The second is whether juries should, in any event, always be instructed to apply elements of the "pretext" formulation as a proxy for discrimination. This is exemplified by emerging law in the Third Circuit. The First Circuit glimpsed at these issues in its most recent decision in this field, but the majority decided not to "enter the thicket."

F. Smith, Jr., "How Do We Work This?" Making Sense of the Liability Standard in Disparate Treatment Employment Discrimination Cases," 14 Maine Bar J. 34, 37 (Jan. 1999).

F.3d 207 (3d Cir. 2000); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995).

The First, Second, Seventh, and Eleventh Circuits have discussed and apparently resolved that the 1991 Act's "motivating factor" burden of proof can be employed without regard to the type of evidence presented and will be triggered whether the employee's claim is established through circumstantial or direct evidence.. *See Carey v. NH Desert Island Hospital*, 156 F.3d 31 (1st Cir. 1998) and *Tanca v. Nordberg*, 98 F.3d 680 (1st Cir. 1996); *Fields v. New York State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116, 122 (2d Cir. 1997); *Howley v. Town of Stratford*, 217 F.3d 141 (2d Cir. 2000); *Pilditch v. Board of Education*, 3 F.3d 1113, 1118, n. 2 (7th Cir. 1993); *Hennessy v. Penril Data Com'm Networks, Inc.*, 69 F.3d 1344, 1351 (7th Cir. 1995); and *Pulliam v. Tallaoosa County Jail*, 185 F.3d 1182, 1186 (11th Cir. 1999). *See, also*, Richard A. Weiber, "The Mixed-Motives Defense in Workplace Discrimination Actions and Its Procedural Issues in the Eleventh Circuit," 51 Mercer L. Rev. (Winter 2000). *See, also*, lower court opinions in *Lapsley v. Columbia University-College of Physicians and Surgeons*, 999 F. Supp. 506 (S.D. N.Y. 1998); *Curley v. St. John's University*, 19 F. Supp.2d 181 (S.D.N.Y. 1998); *Allen v. City of Athens*, 937 F. Supp. 1531, 1540-41 (N.D. Ala. 1996); *Salter v. Douglas McArthur State Technical College*, 929 F. Supp. 1470, 1475 (M.D. Ala. 1996); *Hearn v. General Electric Company*, 927 F. Supp. 1486, 1492-1493 (M.D. Ala. 1996).

Further, the Eighth and Ninth Circuits and others have promulgated model jury instructions that interpret the 1991 Act as mandating a "motivating factor" analytical format for all disparate treatment cases. *See, Ninth Circuit Manual of Model Jury Instructions* at 138 (West 1997); *Manual of Model Jury Instructions for the District Courts of the Eighth Circuit* 5, at 8-50 (1992). *See also* American Bar Association, *Model Jury Instructions for Employment Litigation*, 1.02[1], 1.02[2][a]; Edward J. Devitt, *et al.*,

Federal Practice and Instructions, § 104.03, *(4th Ed. 1992) and Supplement (1994)*[2].

C. The Decisions of the Third and Fourth Circuit Courts of Appeal Are Erroneous.

In ruling that Section 107 does not alter the distinctions in standards of causation that apply to "pretext" and "mixed motives" cases, the Third and Fourth Circuits (in *Watson* and *Fuller*,

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[3] Several voices have suggested that it is time to adopt a simpler motivating factor-like standard in all civil rights litigation. *See, Lapsley v. Columbia University-College of Physicians and Surgeons*, 999 F.Supp. 506, 513-516 (S.D.N.Y. 1998); Denny Chin and Jodi Golinski, *Employment Discrimination: Moving Beyond McDonnell Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 Brooklyn Law Review 659 (Summer 1998); Rebecca Hanner White, *Symposium: There's Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment*, 7 Wm. and Mary Bill of Rights J. 725 (April, 1999); Michael J. Zimmer, *Symposium: Employment Discrimination: Symposium Article: The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 Ga.L.Rev. 563 (Winter, 1996); G. Brill, *Instructing the Jury in an Employment Discrimination Case*, Fed.Cts. L. Rev. at 4.10 (1998); *See, also, Miller v. CIGNA Corp.*, 47 F.3d 586, 599 (3d Cir. 1995) (Greenberg, J., concur):

> The area of employment discrimination law is cursed with elusive terms like "mixed motives" and "pretext", and with numerous presumptions, inferences, and burden-shifting rules. Those terms and rules historically often have taken on lives of their own, independent of their connection to the underlying theories of liability that gave them birth. Thus, a "mixed motives" case has little to do with pretext. I believe the time has come to clarify the current status of theories of ADEA liability, and to dispense with unhelpful monikers whenever possible. Thus, unlike the *en banc* majority, I would dispense altogether with the terms "pretext" and "mixed motives" and hold explicitly that the same standard applies to all disparate treatment cases.
>
> It is this call for clarity that Petitioner Watson joins here.

respectively) violated the canons of statutory construction. The task of any court in interpreting a statute is to effectuate Congress' intent. *Negonsott v. Samuels*, 507 U.S. 99 (1993). A reviewing court must commence its inquiry by examining the text of the statute [*Pension Benefit Guar. Corp. v. White Consoliated Indus., Inc.*, 998 F.2d 1192, 1198 (3d Cir. 1993)] and "where [Congress'] will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). *See also, Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982). Only if the statutory language is unclear, may the court look to legislative history. *Menkowitz v. Pottstown Memorial Hospital*, 154 F.3d 113, 116 (3d Cir. 1998). When the statute and legislative history disagree, the statute controls. *See, e.g., West Virginia University Hosps. v. Casey*, 449 U.S. 83, 97-101 (1991).

While asserting that their focus was on the plain meaning of the statutory text, both courts improperly analyzed the text of the statute ("informed by developments in Title VII case law that immediately preceded the passage of the 1991 Act ") to limit the clear import of the plain meaning of the statutory text. *See, e.g., Watson, at 13-14*. No such examination is permitted or warranted because it must be presumed that Congress knows of prior judicial rulings when it amends a statute. The plain language of the Act in question herein reveals no intention on the part of Congress to limit Section 107 to those disparate treatment cases in which the employee has presented direct evidence of discrimination. In fact, the Civil Rights Act of 1991 makes no distinction between direct and circumstantial evidence. Instead, it simply states that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). Any speculation as to alternative ways that Congress could have chosen to draft the statute to provide greater clarity or the significance of certain language when viewed in conjunction with *Price-Waterhouse* is simply inappropriate and

meaningless. *See* Michael Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 Ga. L.Rev. 563, 601 & nn. 136-137 (1996). In the absence of a clearly expressed legislative intention to the contrary -- and under traditional statutory interpretation methods not used by either the Third or Fourth Circuits -- the language of Section 107 must be regarded as conclusive. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990).

Even assuming that it was appropriate for either court to look to the legislative history of Section 107, they apparently failed to appreciate the significance of that history. The Act's stated purpose, and its legislative history, suggest a broad application of the Section: Congress enacted the Civil Rights Act of 1991 to reverse a series of plaintiff-hostile decisions on the part of the Supreme Court. *See note,* Civil Rights Act of 1991, 42 U.S.C. A. § 1981) (stating as one of the purposes of the Act: to "respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination"). In support of this view, the House of Representatives explained in its Report the intent to extend the "mixed-motive" approach of *Price Waterhouse*:

> The impact of the *[Price Waterhouse]* decision is particularly profound because the factual situation at issue in *Price Waterhouse* is a common one. As the Justice Department correctly observed, "virtually every Title VII disparate treatment case will in some degree entail multiple motives." If Title VII's ban on discrimination in employment is to be meaningful, victims of proven discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions.

H.R. Rep. No. 102-40(I), at 47 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 585 (citation omitted.)

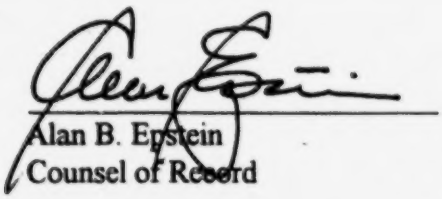
Taking this purpose into account, it seems highly unlikely that Congress overruled that portion of *Price Waterhouse* to make it easier for employees to establish liability, yet also intended to retain a severely limiting ("determining factor" or "but for") test, making an employee's burden as difficult as it had been before the passage of the Act.

Similarly, contrary to their assertions, this Court's opinion in *Landgraf v. USI Prods.*, 511 U.S. 244 (1994), does not "buttress" the strained conclusion of either court. In *Landgraff*, this Court stated that Section 107 "responds to *Price Waterhouse* . . . by setting forth standards applicable in "mixed-motive cases." That statement fails to reveal any indication that Congress intended to extend greater protection to "mixed-motive" cases than to "pretext" cases by retaining the more difficult "determining factor" burden of proof for cases based on circumstantial evidence.

CONCLUSION

An ever increasing number of disparate treatment discrimination cases brought before federal courts will invoke a necessary interpretation of Section 703(m) of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m). Justice for all parties in cases brought by victims of race, sex, religious and national origin discrimination requires that the juries which resolve the factual issues in those cases be instructed uniformly on the controlling burden of proof intended by Congress. In the absence of guidance by this Court, the conflicting positions of the Courts of Appeal which have confronted this issue will deny that uniformity and, in turn, deny justice. Accordingly, it is respectfully requested that this Court exercise its discretion to permit a full review of this issue and that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

By: 

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APPENDIX A

JACQUELINE WATSON, Appellant/Cross-Appellee, v. SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY ("SEPTA"), Appellee/Cross-Appellant.

Nos. 98-1832, 98-1833 and 98-1834

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

207 F.3d 207; 2000 U.S. App. LEXIS 4342; 82 Fair Empl. Prac. Cas. (BNA) 520

May 24, 1999, Argued

March 20, 2000, Filed

PRIOR HISTORY:
[**1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA. (Civ. No. 96-01022). Magistrate Judge: The Honorable M. Faith Angell.

DISPOSITION:
Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant employee appealed denial of her new trial motion regarding federal sex discrimination and disability claims, and a state human rights claim, and cross-appellant employer appealed award of fees and costs entered by the United States District Court for the Eastern District of Pennsylvania in appellant's discrimination case against cross-appellant.

OVERVIEW: Appellant employee sued cross-appellant employer, alleging claims under federal sex discrimination and disability law,

and under state human rights law. Appellant was injured at work. Cross-appellant reassigned her. A male supervisor replaced her with a non-disabled male. She declined a new position. Cross-appellant placed her on inactive status. Later, it rehired her. The jury ruled for cross-appellant. Her motion for a new trial based on an erroneous jury charge was denied. She was awarded partial fees and costs. She appealed and cross-appellant challenged the award of partial fees and costs. The court affirmed. The court held the Civil Rights Act of 1991 did not change the causation standard in Title VII of the Civil Rights Act of 1964 cases, so the jury was correctly instructed gender had to be a determining factor in appellant being made inactive. The court, however, held appellant prevailed for purposes of the partial award.

OUTCOME: Judgment of trial court affirmed because trial court did not commit error in giving a standard determinative-factor jury instruction regarding cross-appellant's adverse employment action, did not commit reversible error with respect to other portions of jury instructions given, and did not abuse its discretion in awarding partial fees and costs.

CORE CONCEPTS

Civil Procedure : Jury Trials : Jury Instructions
Civil Procedure : Appeals : Standards of Review
If a plaintiff preserves her objection to a jury charge, the inquiry is whether the charge, taken as a whole, properly apprises the jury of the issues and the applicable law. If the objection is not preserved, review should be exercised sparingly. Under such circumstances, a verdict will be overturned only where the error is fundamental and highly prejudicial or if the instructions are such that the jury is without adequate guidance on a fundamental question and failure to consider the error would result in a miscarriage of justice.

Civil Procedure : Jury Trials : Jury Instructions
Labor & Employment Law : Employment Discrimination : Actionable Discrimination : Disparate Treatment

Court cases have recognized two types of disparate treatment employment discrimination actions --"pretext" and "mixed-motive"-- and have applied different standards of causation depending on the type of case the plaintiff presented. In "pretext" cases courts have held that a jury must be charged that in order to find for the plaintiff, it must conclude that consideration of the impermissible factor was "a determinative factor" in the adverse employment action. In "mixed-motive" cases, by contrast, courts have held that a plaintiff need only show that the unlawful motive was a "substantial motivating factor" in the adverse employment action.

Labor & Employment Law : Employment Discrimination

Congress has enacted the Civil Rights Act of 1991 (Act) which amended Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e* et seq., to include the following provision: Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated this practice. *(42 U.S.C. § 2000e*-(2)(m) ("Section 107(a)"). Section 107(a) of the 1991 Act thus mandates liability in a set of cases in which consideration of a protected trait was a motivating factor in the adverse employment action even though permissible factors independently explain the outcome. This plainly alters the scope of existing law which completely absolved the employer from liability if it could adequately prove that the adverse action would have been taken even if the protected trait had not been considered.

Evidence : Procedural Considerations

Labor & Employment Law : Employment Discrimination

The Civil Rights Act of 1991, *42 U.S.C.S. § 2000e*-(2)(m) ("Section 107(a)"), does not, at least on its face, alter the other significant holding of existing law: the distinction drawn between "pretext" and "mixed-motive" cases and the evidentiary showing necessary to trigger a shift in the burden of persuasion with respect to causation.

Labor & Employment Law : Employment Discrimination : Sex Discrimination : Remedies

Although the Civil Rights Act of 1991 mandates a finding of liability whenever an illegitimate factor motivates an adverse employment action, *42 U.S.C.S. § 2000e-5*(g)(2)(B)("Section 107(b)"), limits the remedies available to a plaintiff when the employer proves that it would have taken the same action even if the impermissible factor had not been present. Pursuant to this modification of existing law, if the employer successfully demonstrates that the outcome would have been the same even without discriminatory animus, the court may not award monetary damages but may award certain declaratory and injunctive relief, as well as attorney fees and costs demonstrated to be directly attributable to pursuing a claim under *42 U.S.C.S. § 2000e-*(2)(m). *42 U.S.C.S. § 2000e-5*(g)(2)(B).

Labor & Employment Law : Employment Discrimination : Sex Discrimination : Remedies

See *42 U.S.C.S. § 2000e-5*(g)(2)(B)(1994).

Labor & Employment Law : Employment Discrimination Governments & Legislation : Legislation : Construction & Interpretation

In analyzing the question whether *42 U.S.C.S. § 2000e-*(2)(m) eliminates the distinction between the standards of causation applicable to "pretext" and "mixed-motive" cases, a court first looks to the statutory text and its reading of the text is informed by developments in Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. 2000e* et seq., case law that immediately preceded the passage of the Civil Rights Act of 1991.

Labor & Employment Law : Employment Discrimination

The Civil Rights Act of 1991, *42 U.S.C.S. § 2000e-*(2)(m) ("Section 107(b)"), applies only to a claim in which an individual proves a violation under that section.

Labor & Employment Law : Employment Discrimination
Legislative history strongly supports an interpretation of the Civil Rights Act of 1991 that preserves the distinction between "mixed-motive" and "pretext" cases.

Labor & Employment Law : Employment Discrimination : Sex Discrimination
A jury need not be told anything about a defendant's burden of production. Whether or not the facts of plaintiff's prima facie case are disputed, the jury needs to be told two things: (1) it is the plaintiff's burden to persuade the jurors by a preponderance of the evidence that the job was denied because of sex--or, in other cases, because of some other legally invalid reason--and (2) the jury is entitled to infer, but need not infer, that this burden has been met if they find that the facts needed to make a prima facie case have been established and they disbelieve the defendant's explanation.

Civil Procedure : Appeals : Reviewability : Preservation for Review
In order to preserve an issue for appeal, counsel must state distinctly the matter objected to and the grounds of the objection. Fed. R. Civ. P. 51.

Civil Procedure : Appeals : Standards of Review : Clearly Erroneous Review
Civil Procedure : Appeals : Standards of Review : De Novo Review
Civil Procedure : Appeals : Standards of Review : Abuse of Discretion
An appellate court reviews the amount of a fee award for abuse of discretion. Whether a judge applies the proper standard is reviewed de novo and an appellate court reviews the judge's factual findings for clear error.

Labor & Employment Law : Employment Discrimination : Sex Discrimination : Remedies

In order to qualify as a "prevailing party," a plaintiff is required to show that she achieved relief and that there exists a causal connection between the litigation and the relief.

COUNSEL:
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OBERMAYER, REBMANN, MAXWELL & HIPPEL, KENNETH L. OLIVER, JR. (ARGUED), Philadelphia, PA, Counsel for Appellee/Cross-Appellant, Southeastern Pennsylvania Transportation Authority.

JUDGES:
Before: GREENBERG and ALITO, Circuit Judges, and ACKERMAN, Senior District Judge * .

> * The Honorable Harold A. Ackerman, Senior United States District Judge for the District of New Jersey, sitting by designation.

OPINIONBY:
ALITO

OPINION:

[*211] OPINION OF THE COURT

ALITO, Circuit Judge:

Jacqueline Watson filed this sex- and disability-discrimination action against her former employer, the Southeastern Pennsylvania Transportation Authority ("SEPTA"). After the jury returned a verdict for SEPTA, the Magistrate Judge before whom the case was tried by consent denied Watson's motion for a new trial but partially granted

her motion for attorney's fees and costs. [**2] Watson appealed, and SEPTA cross-appealed the partial award of attorney's fees and costs.

Watson's appeal focuses on the Magistrate Judge's jury instructions. The first issue concerns Watson's disparate-treatment claim under Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e-2* (1994). Specifically, we address whether an amendment enacted as part of the Civil Rights Act of 1991, P.L. 102-166 (the "1991 Act"), eliminated the distinction between the standards of causation applicable in, on the one hand, so-called "mixed-motive" cases, in which we have held that a defendant may be held liable upon a showing that an illegitimate factor was a "motivating" factor in the adverse action, and, on the other hand, so-called "pretext" cases, in which we have held that a defendant may be held liable upon a showing that an illegitimate factor was a "determinative" factor in the adverse action. In accordance with decisions of the Second and Fourth Circuits n1 (the only other courts of appeals that have analyzed this question), we hold that this distinction survives the passage of the 1991 Act, and since this is a "pretext" case, we also hold that the Magistrate [**3] Judge did not err in giving a standard determinative-factor instruction. In addition, because we hold that the Magistrate Judge did not commit reversible error with respect to any of the other portions of the jury instructions that Watson has challenged on appeal, and because the Magistrate Judge did not abuse her discretion in setting fees and costs, we affirm the judgment in its entirety.

n1 *Fields v. New York State Office of Mental Retardation and Developmental Disabilities, 115 F.3d 116, 117 (2d Cir. 1997); Fuller v. Phipps, 67 F.3d 1137, 1143-44 (4th Cir. 1995).*

I. n2

n2 We set forth the facts in a light most favorable to SEPTA because the jury returned a verdict in its favor on Watson's sex- and disability-discrimination claims. *Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3d Cir. 1990);*

Hahn v. Atlantic Richfield Co., 625 F.2d 1095, 1098-99 (3d Cir. 1980).

[**4]

Watson began working for SEPTA in 1983. By 1986, she was promoted to a job as a Construction Equipment Operator, a position that literally required "heavy lifting." In February 1990, she was involved in a work-related accident that permanently injured her neck and back and rendered her unable to engage in the lifting required by her position. In May 1990, Watson returned to work. Her physician instructed her not to lift more than 20 pounds. SEPTA accommodated her disability by assigning her to a position in Quality Control at the equipment yard.

In late 1992, a male supervisor was assigned to oversee Watson. In 1993, the new supervisor assigned Watson clerical duties in addition to her quality control tasks. Watson claimed that her disability prevented her from doing the clerical work because of the strain placed on her back by having to sit and stand frequently during the working day. Watson claims that her position in Quality Control was thereafter assigned to a non-disabled male.

SEPTA's Medical and Labor Relations Departments met to discuss the positions available to Watson given her 20- pound weight-lifting restriction. In July 1994, SEPTA assigned her to a job as a mail [**5] run operator, a position that required her to drive a Chevrolet Suburban and to deliver mail to several SEPTA locations. According [*212] to Watson, she declined this job because she would have been required to lift more than 20 pounds. SEPTA claims it told her that she could break larger packages into smaller ones if any exceeded the 20-pound weight limit. After Watson declined the job, she went on medical leave starting in September 1994. She became an inactive SEPTA employee, receiving no pay but continuing to be covered by SEPTA's medical plan.

In February 1996, Watson filed this lawsuit, alleging, among other things, that SEPTA discriminated against her because of her sex

and disability, in violation of Title VII of the Civil Rights Act of 1964 (Title VII), *42 U.S.C. § § 2000e* et seq. (1994), the Americans with Disabilities Act (ADA), *42 U.S.C. § 12101* et seq. (1994), and the Pennsylvania Human Relations Act (PHRA), 43 P.S.A. § § 951 et seq. (West 1991). From June 1996 forward, SEPTA's attorneys were in contact with Watson's attorney in an effort to locate a position for her within SEPTA that would properly accommodate her disability. [**6]

In November 1996, the Magistrate Judge entered summary judgment in SEPTA's favor with respect to Watson's claims for punitive damages under Title VII and the ADA, as well as with respect to her retaliation and intentional infliction of emotional distress claims. The Magistrate Judge denied SEPTA's summary judgment motion, however, with respect to Watson's disparate-treatment sex- and disability-discrimination claims and set those claims for trial.

After a settlement conference in which the Magistrate Judge urged SEPTA to consider reactivating Watson, SEPTA re-hired her as a mail run operator. She nevertheless proceeded to trial to recover back pay and compensatory or punitive damages -- the latter under the PHRA. After the close of evidence, the Magistrate Judge entered judgment as a matter of law in SEPTA's favor on the PHRA claim for punitive damages. The jury returned a verdict in SEPTA's favor on the remaining sex-and disability-discrimination claims. After the Magistrate Judge denied Watson's motion for a new trial based on alleged errors in the jury charge, Watson petitioned for an award of attorney's fees based on her reinstatement to the mail run operator position. The [**7] Magistrate Judge awarded Watson partial attorney's fees in the amount of $ 26,985.03 and costs in the amount of $ 5,686.25.

Watson appeals from the denial of her motion for a new trial. This appeal concerns the validity of the jury charge. Both parties appeal the award of fees and costs.

II.

A.

1.

The chief issue in this appeal is whether the Magistrate Judge properly charged the jury on the law of sex and disability discrimination. If Watson preserved her objection to the charge, the inquiry is whether the charge," 'taken as a whole, properly apprises the jury of the issues and the applicable law.' " *Smith v. Borough of Wilkinsburg, 147 F.3d 272, 275 (3d Cir. 1998)* (citation omitted). If the objection was not preserved, review should be exercised sparingly. Id. Under such circumstances, we will overturn a verdict "only where the error is fundamental and highly prejudicial or if the instructions are such that the jury is without adequate guidance on a fundamental question and our failure to consider the error would result in a miscarriage of justice." Id. During the charging conference, Watson objected to several aspects of the charge. n3 [*213] First, she contended [**8] that the Magistrate Judge should not instruct the jury that she was required to show that her "sex was a determining factor in her going on inactive status" or that "but for plaintiff 's sex, the adverse employment action would not have occurred." (App. 135). Watson argued that the 1991 Act had changed the standard of causation in Title VII "pretext" cases from a requirement that the illegitimate criterion be a "determining" factor of the adverse action to a requirement that the illegitimate criterion be merely a "motivating" factor. She did not then nor does she now take issue with the District Court's use of a determinative factor instruction with respect to her claim under the ADA.

> n3 Because the Title VII instructions are at the center of this appeal, we set them forth below in detail:
>
> The plaintiff ... claims that SEPTA discriminated against her because of her sex, by improperly considering the fact that she is female in failing to place her in positions that she desired, and in plaintiff 's going on inactive status ....

To meet her burden of proving that she was discriminated against by SEPTA on the basis of sex under Title 7 or the PHRA, the plaintiff must prove by a preponderance of the evidence that she was qualified for a position of employment at SEPTA, that despite being qualified, she suffered adverse employment consequences that give rise to an inference of sex discrimination.

If the plaintiff fails to prove any of these elements, then your verdict must be for the defendant. If, however, the plaintiff proves all of these elements, then your analysis does not end there.

The defendant in this case has articulated a legitimate nondiscriminatory reason for placing Mrs. Watson on inactive status. By doing so, the defendant has met its burden of producing some explanation of its actions other than discrimination. It is not necessary that the reason be a good one, or even that you believe it to be true. All the defendant need do is state a reason other than a perception that plaintiff was disabled to explain its actions. It is the plaintiff 's obligation to prove that sex was the reason for the defendant's action.

By meeting this intermediary burden, the defendant has shifted the burden of persuasion back to the plaintiff, to show, by a preponderance of the evidence, that the reason offered by SEPTA is false, or is a pretext for sexual discrimination. Here, as in the disability determination context, the plaintiff may meet this burden of proof either by persuading you that a discriminatory reason more likely than not motivated the defendant or by persuading you that the defendant's proffered explanation is unworthy of belief.

In order for the plaintiff to recover under Title 7 and/or PHRA for sex discrimination, she must prove by a preponderance of the evidence that SEPTA intentionally

discriminated against her because of her sex. Ultimately, you must decide whether Jacqueline Watson's sex was a determining factor in her going on inactive status. Again, for your purposes, determining factor means that but for the plaintiff's sex, the adverse employment action would not have occurred.

(App. 130-35).

[**9]

Next, Watson objected to the inclusion in the Title VII and ADA jury instructions of the McDonnell Douglas burden-shifting scheme. n4 Once a case is submitted to the [*214] trier of fact, Watson contended, the McDonnell Douglas scheme is no longer relevant and, in order to avoid confusion, should not be described to the jury.

n4 The Magistrate Judge charged the jury as follows with respect to the ADA:

To recover against the defendant under the ADA ... , the plaintiff has the burden of proving all three of the following elements by a preponderance of the evidence. If you find that the plaintiff has proven none, one, or only two of the three elements, then your verdict must be for the defendant with respect to the plaintiff's disability claims under the ADA.

First, the plaintiff has the burden of proving that she either has a disability, or has a record of disability, or was "regarded as disabled by her employer." ...

Second, the plaintiff also has the burden of proving she is a "qualified individual," meaning that she can, with or without reasonable accommodation, perform the essential functions of the employment position that she holds or desires ....

And, third, the plaintiff has the burden of proving that she has suffered adverse employment action because of her disability ....

If you find that the plaintiff has proved that she was disabled, has a record of disability or was regarded as disabled by SEPTA, then you must additionally consider whether the plaintiff has proven that she is otherwise qualified to perform the essential functions of her job with or without a reasonable accommodation, and you must consider whether the plaintiff has suffered adverse employment action because of her disability.

If all three of these conditions have been met, your analysis does not end there. The defendant in this case has articulated a legitimate, nondiscriminatory reason for placing Ms. Watson on inactive status. By doing so, the defendant has met its burden of producing some explanation of its actions other than discrimination.

It is not necessary that the reason be a good one, or even that you believe it to be true. All the defendant need do is state a reason other than a perception that plaintiff was disabled to explain its actions. It is the plaintiff 's obligation to prove that a perceived disability was the reason for the defendant's action.

It is the plaintiff 's obligation to prove that a perceived disability was the reason for the defendant's action. By meeting this intermediary burden, the defendant has shifted the burden of persuasion back to the plaintiff, to show, by a preponderance of the evidence, that the reason offered by SEPTA is false, or is a pretext for disability discrimination. The plaintiff may meet this burden of proof either by persuading you that a discriminatory reason more likely than not motivated the defendant, or by persuading you that the defendant's proffered explanation is unworthy of belief.

If you find that Mrs. Watson has proven that she was disabled, or that she had a record of disability, or that SEPTA regarded her as disabled, that she was a "qualified individual;" that an adverse action was taken with regard to her employment; and you find that Mrs. Watson has proven that the reason offered by SEPTA for its treatment of her is a pretext for disability discrimination, then your verdict must be for Mrs. Watson under the ADA. Ultimately, the question that you must answer to yourselves is whether plaintiff's disability, record of disability, or her being regarded as disabled, served as a determining factor for SEPTA as to Jacqueline Watson going on inactive status. The phrase "determining factor" means that but for the plaintiff 's disability, record of disability, or her being regarded as disabled, the adverse employment action would not have occurred.

(App. 127-30).

[**10]

After the charge was read but before the jury returned its verdict, Watson also objected to the inclusion of the following language in both the disability- and sex-discrimination charges:

It is not necessary that the [non-discriminatory] reason be a good one, or even that you believe it to be true. All the defendant need do is state a reason other than a perception that plaintiff was disabled to explain its actions. It is the plaintiff 's obligation to prove that [an impermissible factor] was the reason for the defendant's action. (App. 141) (emphasis added). Watson argued that this language erroneously implied that the defendant "could give a reason that was totally fallacious and that could carry the day." (App. 143).

Finally, Watson argued that instructing that an impermissible factor must be "the reason" for the defendant's action erroneously implied that liability attaches only if an impermissible factor is the

only reason for an adverse decision, as opposed to merely a motivating or determinative reason.

2.

We first address whether the Magistrate Judge properly concluded that the "motivating" factor test set forth in the 1991 Act applies only to "mixed-motive" cases. [**11]

Our court's cases have recognized two types of disparate treatment employment discrimination actions --"pretext" and "mixed-motive"--and have applied different standards of causation depending on the type of case the plaintiff presented. n5 See, e.g., *Griffiths v. CIGNA* [*215] *Corp., 988 F.2d 457, 472 (3d Cir. 1993)* (recognizing distinction between "pretext" and "mixed-motive" cases in Title VII retaliatory discharge action), overruled on other grounds by *Miller v. CIGNA Corp., 47 F.3d 586, 595 (3d Cir. 1995)* (en banc) (recognizing distinction in ADEA action). In "pretext" cases of the type at issue here, we have held that a jury must be charged that in order to find for the plaintiff, it must conclude that consideration of the impermissible factor was "a determinative factor" in the adverse employment action. See *Smith, 147 F.3d at 279* (ADEA); *Miller, 47 F.3d at 595* (ADEA); *Hook v. Ernst & Young, 28 F.3d 366, 369 (3d Cir. 1994)* (Title VII disparate treatment); see also *Hazen Paper Co. v. Biggins, 507 U.S. 604, 610, 123 L. Ed. 2d 338, 113 S. Ct. 1701 (1993)* ("Whatever the employer's decisionmaking process, a [**12] disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome."). In "mixed-motive" cases, by contrast, we have held that a plaintiff need only show that the unlawful motive was a "substantial motivating factor" in the adverse employment action. *Miller, 47 F.3d at 594.*

> n5 The "pretext" and "mixed-motive" labels are misleading. As we noted in *Miller v. CIGNA Corp., 47 F.3d 586, 597 n.9 (3d Cir. 1995)* (en banc), a case that does not qualify for a burden-shifting instruction under *Price*

Waterhouse v. Hopkins, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989), may nevertheless involve challenged action by an employer that resulted from two or more motives. Moreover, in a non-Price Waterhouse case, a plaintiff need not necessarily show "pretext" but may prevail simply by showing, through direct or circumstantial evidence, that the challenged action resulted from discrimination. See *Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994).* Nevertheless, we use the terms "pretext" and "mixed-motive" because they are familiar and the introduction of new terminology might lead to even greater confusion.

[**13]

This distinction in standards of causation in "mixed-motive" and "pretext" cases can be traced to the Supreme Court's decision in *Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989).* There, the plurality held that once a plaintiff demonstrates that the adverse decision is the result of mixed motives (i.e. that it is the "result of multiple factors, at least one of which is illegitimate" and the illegitimate factor played "a motivating part" in the adverse decision), the burden shifts to the employer to persuade the jury by a preponderance of the evidence that it would have reached the same decision even if the protected trait had not been considered. *Price Waterhouse, 490 U.S. at 244-45, 260* (plurality opinion). This shift in the burden of persuasion makes an employer potentially liable upon a causation showing -- that an illegitimate criterion was a motivating, although not a determinative, factor in the adverse employment decision -- that is less exacting than the causation test in the usual "pretext" case, where consideration of a protected trait must be shown to be a determinative factor in the adverse action. See [**14] *Biggins, 507 U.S. at 610.* The Price Waterhouse plurality opinion also created an affirmative defense for the employer that, if proven, absolved the employer completely of any Title VII liability. *Price Waterhouse, 490 U.S. at 242* ("We conclude that ... an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision

regarding a particular person.") (emphasis added) (plurality opinion); *Tanca v. Nordberg, 98 F.3d 680, 681 (1st Cir. 1996)* ("Put another way, the Court held that it was an affirmative defense to a charge of unlawful intentional discrimination to show that the employer would have made the same decision even in the absence of an unlawful motive.").

Justice O'Connor's concurrence in Price Waterhouse limited the scope of the plurality's holding, however, by setting forth the predicate necessary to trigger the shift in the burden of persuasion described above. *490 U.S. at 262.* Pursuant to Justice O'Connor's concurrence, only plaintiffs who "demonstrate[ ]" with "sufficiently direct" evidence that an impermissible factor was a motivating factor are entitled to the [**15] shift in the burden of persuasion. See *Price Waterhouse, 490 U.S. at 275* (O'Connor, J., concurring); *Fuller v. Phipps, 67 F.3d 1137, 1141 (4th Cir. 1995).* As Justice O'Connor made clear in her concurrence, the Price Waterhouse shift in the burden of persuasion does not apply to "pretext" cases, in which plaintiffs prove intentional discrimination indirectly through the burden-shifting paradigm set forth in McDonnell Douglas and [*216] its progeny. n6 See *Price Waterhouse, 490 U.S. at 277-78.* Such plaintiffs, under Price Waterhouse, are still required to satisfy the more stringent "determinative factor" test for causation. Id.

> n6 See *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973);* See also, e.g. *Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981).*

Congress responded to Price Waterhouse with Section 107(a) of the 1991 Act, which amended Title VII to include the [**16] following provision:

> Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating

> factor for any employment practice, even though other factors also motivated this practice.

42 U.S.C. § 2000e-(2)(m). Section 107(a) of the 1991 Act thus mandates liability in a set of cases (the scope of that set is, of course, the issue here) in which consideration of a protected trait was a motivating factor in the adverse employment action even though permissible factors independently explain the outcome. This plainly alters the scope of the Price Waterhouse affirmative defense, which, as explained above, completely absolved the employer from liability if it could adequately prove that the adverse action would have been taken even if the protected trait had not been considered. Significantly, Section 107(a) does not, at least on its face, alter the other significant holding of Price Waterhouse set forth in Justice O'Connor's concurrence -- i.e., the distinction drawn between "pretext" and "mixed-motive" cases and the evidentiary [**17] showing necessary to trigger a shift in the burden of persuasion with respect to causation. See *Robinson v. Southeastern Pa. Transp. Auth., 982 F.2d 892, 899 n.8 (3d Cir. 1993)* (1991 Act overruled "that portion of Price Waterhouse that permitted an employer to avoid liability if it could demonstrate it would have taken the same action in the absence of discriminatory motive") (emphasis added); *Tanca, 98 F.3d at 681* ("Congress partially overruled Price Waterhouse in the 1991 Act by allowing a finding of liability and limited relief to plaintiffs in mixed motive cases") (emphasis added); *Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 552 (10th Cir. 1999)* ("Section 107(a) ... overruled the Supreme Court's decision in Price Waterhouse to the extent that that decision holds an employer can avoid a finding of liability by proving it would have taken the same action even absent the unlawful motive") (emphasis added); *Fields v. New York State Office of Mental Retardation and Developmental Disabilities, 115 F.3d 116, 124 (2d Cir. 1997)* (Section 107 "was enacted solely to overrule the part of Price Waterhouse that allowed an employer to avoid [**18] all liability by prevailing on its dual motivation defense") (emphasis added).

Although Section 107(a) mandates a finding of liability whenever an illegitimate factor motivates an adverse employment action, Section 107(b) limits the remedies available to a plaintiff when the employer proves that it would have taken the same action even if the impermissible factor had not been present. Pursuant to this modification of the Price Waterhouse affirmative defense, if the employer successfully demonstrates that the outcome would have been the same even without discriminatory animus, the court may not award monetary damages but may award certain declaratory and injunctive relief, as well as attorney fees and costs demonstrated to be directly attributable to pursuing a claim under Section 107(a). *42 U.S.C. § 2000e-5*(g)(2)(B). n7

n7 The text of this section reads:

On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court --

(i) may grant declaratory relief, injunctive relief (except as provided in clause

(ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-(2)(m) of this title; and (ii) shall not award damages or issue an order requiring any admission, restatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 2000e-5(g)(2)(B) (1994).

[**19]

[*217] We now turn to the primary issue in this appeal--whether Section 107(a) of the 1991 Act eliminated the distinction between the standards of causation applicable to "pretext" and "mixed-motive"

cases. In analyzing this question, we first look to the statutory text, see *In re Unisys Sav. Plan Litig., 74 F.3d 420, 444 (3d Cir. 1996),* and our reading of the text is informed by developments in Title VII case law that immediately preceded the passage of the 1991 Act -- specifically, the Supreme Court's decision in the Price Waterhouse case. See *Landgraf v. USI Film Prods., 511 U.S. 244, 250, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994)* ("The 1991 Act is in large part a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964.").

While we certainly do not pretend that the text of Section 107(a) speaks with unmistakable clarity, the text suggests to us that Section 107(a) was designed to apply only to Price Waterhouse "mixed-motive" cases. First, the description of the set of cases to which Section 107(a) applies -- i.e., cases in which "the complaining party demonstrates that race, color, religion, sex, or national origin [**20] was a motivating factor for any employment practice, even though other factors also motivated this practice" -- is a precise description of Price Waterhouse"mixed-motive" cases. Statutory drafters seeking to target that class of cases would use exactly this sort of language -- whereas drafters wishing to target all disparate treatment cases would have no need to do so. If the drafters of Section 107(a) had wanted to reach all disparate treatment cases against employers, they could have simply said something like the following:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established under subsection (a) of this section when the evidence shows that race, color, religion, sex, or national origin was a motivating factor for any employment practice.

Under these circumstances, there would have been no need to include the additional phrase "even though other factors also motivated the practice." Section 107(a), *42 U.S.C. § 2000e-2*(m). See *Cushman v. Trans Union Corp., 115 F.3d 220, 225 (3d Cir. 1997)*(we strive to

read statutes to "avoid a result that would render statutory language superfluous, [**21] meaningless, or irrelevant.").

Moreover, it hardly seems to be a coincidence that the term "demonstrates" in Section 107(a) is precisely the term that Justice O'Connor repeatedly used in key portions of her Price Waterhouse concurrence to describe the showing that a plaintiff must make to trigger a shift in the burden of persuasion. See *490 U.S. at 275* (emphasis added) ("In a case like this one, where an employee has demonstrated by direct evidence ...."); *id. at 276* (emphasis added)("Once a Title VII plaintiff has demonstrated by direct evidence that discriminatory animus played a significant or substantial role in the employment decision, the burden shifts to the employer to show that the decision would have been the same absent discrimination."); id. (emphasis added)("Requiring that the plaintiff demonstrate that an illegitimate factor played a substantial role in the employment decision identifies those employment situations where the deterrent purpose of Title VII is most clearly implicated."). The use of this very term in Section 107(a) makes perfect sense if the drafters wished to denote cases in which the plaintiff shows by what Justice O'Connor [**22] called "direct evidence" that an impermissible factor [*218] played a role in the challenged decision. See Webster's Third New International Dictionary 601 (1971)(defining "demonstrate" as "to manifest clearly, certainly, or unmistakably"). By contrast, the term demonstrates is not the most apt choice if the drafters wanted to describe, not just cases in which the plaintiff offers "direct" evidence of discriminatory animus, but also the great number of disparate treatment cases in which the plaintiff, proceeding under McDonnell Douglas, establishes the elements of a prima facie case and urges the factfinder to infer discriminatory animus from the employer's asserted failure to offer a credible alternative reason for the contested employment action.

Section 107(a)'s complementary statutory provision, Section 107(b), *42 U.S.C. § 2000e-5*(2)(g)(B), provides further contextual evidence that Congress intended for Section 107(a) to apply only to "mixed-motive" cases. As we explained above, Section 107(b) alters

the scope of the affirmative defense created by Price Waterhouse (by making it a defense, not to liability, but merely to certain forms of relief). If Section [**23] 107(a) had been meant to establish a new standard of causation for all disparate treatment cases against employers, then Section 107(b) naturally would have been drafted to apply to all cases brought under *42 U.S.C. § 2000e-2*(a), the provision that sets out unlawful employment practices by employers. Instead, Section 107(b) applies only to "a claim in which an individual proves a violation under Section 2000e-2(m)"(emphasis added). This language suggests that Congress intended to draw a distinction between most disparate-treatment cases against employers (which are brought under *42 U.S.C. § 2000e-2*(a)) and a subset of cases "in which an individual proves a violation under Section 2000e-2(m). [Section 107(a)]." This choice of language is understandable if, as we hold, Section 107(a) applies only to Price Waterhouse"mixed-motive" cases, but there would be no apparent reason for this language if Section 107(a) applied to all disparate treatment cases against employers. For these reasons, the statutory text suggests to us that Section 107(a) applies only to "mixed-motive" cases. The legislative history points to the same conclusion. [**24] n8 The House Report's discussion of Section 107 appears in a section entitled, "The Need to Overturn Price Waterhouse." H.R. Rep. No. 102-40(I), reprinted in 1991 U.S.C.C.A.N. at 583. The first paragraph of this discussion identifies the portion of the holding in Price Waterhouse that the legislation was meant to [*219] overrule, namely, the holding that "the defendant may avoid a finding of liability ... by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff 's gender into account," id. (emphasis added). Moreover, a footnote takes pains to note that the legislation was not intended to overrule the decision in toto. Id. n.39. Later, the Report emphasizes that Section 107 was designed to "overrule[ ] one aspect of the Supreme Court's decision in Price Waterhouse" and that Section 107 "would clarify that proof that an employer would have made the same employment decision in the absence of discriminatory employment practices, is relevant to determine not the liability for discriminatory employment practices,

but only the appropriate remedy") (emphasis on "one aspect" added, emphasis on "remedy" in original). As the Second [**25] and Fourth Circuits have concluded, the legislative history strongly supports an interpretation of the statute that preserves the distinction between "mixed-motive" and "pretext" cases. See *Fields, 115 F.3d at 124* ("The House Committee report makes clear that section 107 [*220] was enacted solely to overrule the part of Price Waterhouse that allowed an employer to avoid all liability by prevailing on its dual motivation defense"); *Fuller, 67 F.3d at 1144* ("The legislative history makes evident that Congress sought to alter the standards of liability in mixed-motive cases.").

n8 As one commentator has noted, "the Civil Rights Act of 1991 is unusual in that it comes with little traditional legislative history." David A. Cathcart and Mark Snyderman, The Civil Rights Act of 1991, SB36 ALI-ABA 277, 295 (1997). The main source of legislative history that we cite is House Report No. 102-40, which was written before Senator Danforth introduced the substantially revised bill that was to become the 1991 Act. Significantly, however, the language that became Section 107 of the 1991 Act did not undergo meaningful change from the time of the first version of the bill until the enactment of the 1991 Act. See H.R. 1, 102nd Cong. § 5(a)(1) (January 6, 1991) ("Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a contributing factor for any employment practice, even though other factors also contributed to such practice"); H.R. 1, 102nd Cong. § 5(a)(1) (March 11, 1991) (same); H.R. 1, 102nd Cong. § 5(a)(1) (May 18, 1991) (same); H.R. 1, 102nd Cong. § 103(a)(1) (June 7, 1991) ("Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for such employment

practice, even though other factors also contributed to such practice"); H.R. 1, 102nd Cong. § 103(a)(1) (June 12, 1991) (same); H.R. 1, 102nd Cong. § 103(a)(1) (July 9, 1991) (same). House Report No. 102-40 was written in April and May of 1991, see H.R. Rep. No. 102-40, reprinted in 1991 U.S.C.C.A.N. at 549, and the only difference in language between § 103(a)(1) of the June 12 version of the House bill and Section 107(a) of the 1991 Act is the substitution of the phrase "motivated the practice," for "contributed to the practice" in the final clause.

[**26]

Our holding is also buttressed by the Supreme Court's opinion in *Landgraf v. USI Prods., 511 U.S. 244, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994).* In Landgraf, the Court held that Section 102 of the 1991 Act, which created a right to recover compensatory and punitive damages for certain violations of Title VII and further provided that any party could demand a trial by jury if such damages were sought, did not apply retroactively to a Title VII case that was pending on appeal when the 1991 Act was enacted. The Court prefaced its analysis of this issue with a discussion of the scope of the 1991 Act in which it described various sections of the 1991 Act as responding to recent Supreme Court decisions. See *id. at 250-51.* In its discussion, the Court described Section 107, the provision at issue in this case, by stating, albeit in dictum, that " § 107 responds to Price Waterhouse v. Hopkins, by setting forth standards applicable in 'mixed motive' cases." *Landgraf, 511 U.S. at 251* (citations omitted).

As previously noted, the Second and Fourth Circuits have reached the same conclusion that we do here. In *Fuller v. Phipps, 67 F.3d 1137 (4th Cir. 1995),* [**27] the Fourth Circuit held that "Section 107 was intended to benefit plaintiffs in 'mixed-motive' cases; it has nothing to say about the analysis in "pretext" cases such as this one." *Fuller, 67 F.3d at 1143.* The Fourth Circuit first pointed to the dictum in Landgraf that we noted above. The Court next analyzed the

text of the statute, which it found "contemplated a mixed-motive setting [by] specifically referring to situations in which the plaintiff demonstrates that an illicit consideration has influenced the employment decision and in which other factors may also have played a role." *Fuller, 67 F.3d at 1143-44.* Finally, the Fourth Circuit examined the legislative history and found it "evident that Congress sought to alter the standards of liability in mixed-motive cases." *Id. at 1144.* The Fuller Court therefore concluded that "only those plaintiffs who satisfy the evidentiary burden entitling them to mixed-motive treatment can qualify for an instruction under Section 107." *Id. at 1144.*

The Second Circuit also considered whether "the distinction between so-called 'pretext' cases and 'dual motivation' cases ... survived the 1991 [**28] amendments to Title VII." *Fields v. New York State Office of Mental Retardation and Developmental Disabilities, 115 F.3d 116, 117 (2d Cir. 1997).* After noting that "the House Committee report makes clear that section 107 was enacted solely to overrule the part of Price Waterhouse that allowed an employer to avoid all liability by prevailing on its dual motivation defense," the Second Circuit held that "the distinction between 'dual motivation' and 'substantial motivation' jury instructions survives the 1991 Act." *Id. at 124.* n9

> n9 We are not persuaded by the contrary authority on which Watson relies. Although *Harris v. Shelby County Board of Education, 99 F.3d 1078, 1084-85 (11th Cir. 1996),* applied section 107(a) in a "pretext" case, the Court did not explain its reasons for doing so and did not analyze any of the arguments that persuaded the Second and Fourth Circuits -- and that convince us -- that section 107(a) has a narrower scope. Indeed, it is not apparent from the Harris opinion that the Court considered the possibility that section 107(a) might be restricted to "mixed motive" cases. See *Woodson v. Scott Paper Co., 109 F.3d 913, 935 n.29 (3d Cir. 1997).* We therefore do not find Harris and comparable district court

decisions, see *Woodson, 109 F.3d at 935 n.29* (citing cases) to be persuasive.

Watson also relies on *Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344 (7th Cir. 1995),* for the proposition that § 107(a) applies to "pretext" as well as "mixed motive" cases. It is doubtful, however, whether Hennessey actually supports that proposition. In Hennessey, the trial judge instructed the jury in accordance with section 107(a), but there was "direct evidence" of discriminatory intent on the part of the employer (see *69 F.3d at 1350),* and therefore the case may have qualified for special treatment under Price Waterhouse prior to the 1991 Act. Moreover, the appellant in Hennessey did not challenge the causation standard set out in the instruction, but instead argued that the trial court "erred when it failed to instruct the jury on the [McDonnell Douglas] burden-shifting method of proving intentional discrimination by indirect evidence." Id.

Last, Watson cites the Ninth Circuit Manual of Model Jury Instructions 138 (West 1997) and the Eighth Circuit's Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit 74 (West 1993). Like the Second Circuit in Fields, we find the jury instruction manuals to be unpersuasive in light of the text of Section 107 and its legislative history. See *Fields, 115 F.3d at 123.*

[**29]

Finally, we believe it bears mentioning that adopting the interpretation that Watson advocates would not, on balance, bring greater simplicity to employment discrimination law. While Watson's interpretation would mean that the "motivating factor" standard would apply to all disparate treatment Title VII claims against employers, the "determinative factor" standard would still apply to certain other Title VII claims, see *Woodson, 109 F.3d at 931* (holding that Section 107 does not apply to Title VII retaliatory discharge cases brought under *42 U.S.C. § 2000e-3),* as well as a variety of common

employment discrimination claims under other statutes, such as the Age Discrimination in Employment Act. See *Smith v. Borough of Wilkinsburg, 147 F.3d 272, 278 (3d Cir. 1998)*(ADEA). As the case now before us illustrates, it is common for employment discrimination complaints to combine claims under different statutes. Thus, adoption of Watson's interpretation would mean that in a case involving, say, a Title VII race claim, a Title VII retaliation claim, and an ADEA claim, the trial judge would face the challenge of trying to make lay jurors [**30] understand that "because of " means one thing as applied to the first claim and another thing as applied to the other claims. It is doubtful that Congress would want such a result, and we are reluctant to put trial judges in this predicament. Compared with the confusion that would result from adopting Watson's interpretation, retaining the distinction between the standards of causation in "pretext" and "mixed motive" cases will cause fewer practical problems because cases in which the plaintiff can make the demonstration demanded under Justice O'Connor's Price Waterhouse concurrence are relatively uncommon, and it is even more uncommon to have a Price Waterhouse "mixed motive" claim and a "pretext" claim in the same case.

We thus hold that Section 107 does not alter the distinction in standards of causation that apply to "pretext" and "mixed-motive" cases and, accordingly, that the "determinative" factor jury instructions in this cases were correct.

[*221] 3.

We next consider Watson's argument that we should reverse and order a new trial because the Magistrate Judge instructed the jury regarding of the McDonnell Douglas burden-shifting scheme. In *United States Postal Service v. Aikens, 460 U.S. 711, 713, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983),* [**31] the Supreme Court wrote that "when the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff 's proof by offering evidence of the reason for the [challenged action]," the question whether the plaintiff "really [established] a prima facie

case is no longer relevant," and "the factfinder must then decide whether the rejection was discriminatory." *Id. at 714-15.*

While Aikens lends support to Watson's argument, we held in *Smith v. Borough of Wilkinsburg, 147 F.3d 272, 280 (3d Cir. 1998)*(emphasis added), that jurors must be instructed that they are "entitled to infer, but need not, that the plaintiff 's ultimate burden of demonstrating intentional discrimination by a preponderance of the evidence can be met if they find that the facts needed to make up the prima facie case have been established and they disbelieve the employer's explanation for its decision." We reconciled Aikens by noting that "this does not mean that the instruction should include the technical aspects of the McDonnell Douglas burden shifting, a charge reviewed as unduly confusing and irrelevant for a jury." *Id. at 280 n.4.* [**32] In *Pivirotto v. Innovative Systems, Inc., 191 F.3d 344, 347 n.1 (3d Cir. 1999),* we provided extensive guidance in the place of the McDonnell Douglas scheme in jury instructions.

Under Smith, it is clearly proper to instruct the jury that it may consider whether of the factual predicates necessary to establish the prima facie case have been shown. Consequently, we reject Watson's argument that the Magistrate Judge erred in this case in instructing the jury on the factual elements of the prima facie case.

The Magistrate Judge did err, however, in including language regarding the defendant's intermediate burden of producing evidence of a legitimate non-discriminatory reason for its actions. As we noted in Smith, whether the defendant has met its intermediate burden of production under the McDonnell Douglas test is a "threshold matter to be decided by the judge." *Smith, 147 F.3d at 279* (quoting *Cabrera v. Jakabovitz, 24 F.3d 372, 382 (2d Cir. 1994)).*

The jury need not be told anything about a defendant's burden of production .... Whether or not the facts of plaintiff 's prima facie case are disputed, the jury needs to be told two things: [**33] (1) it is the plaintiff 's burden to persuade the jurors by a preponderance of the evidence that the ... job ... was denied because of race (or, in other

cases, because of some other legally invalid reason), and (2) the jury is entitled to infer, but need not infer, that this burden has been met if they find that the [facts needed to make a prima facie case] have been established and they disbelieve the defendant's explanation.

Id. Because the defendant's intermediate burden of production is an issue solely for determination by the court, the Magistrate Judge erred by including an instruction discussing SEPTA's intermediate burden of production in this case.

Whether we should vacate the judgment because of this error is another matter, however. In *Bruno v. W.B. Saunders Co., 882 F.2d 760, 768 (3d Cir. 1988),* we assumed that it was error to instruct the jury on the circumstantial order of proof developed in McDonnell Douglas, but we affirmed the jury's verdict after noting that the charge "fairly and adequately described the shifting burdens of production and persuasion." *Id. at 768.* We held that "even assuming that submission to the jury of [**34] the question whether the plaintiff made out a prima facie case [was] error, ... the instructions ... could [*222] [not] have confused and misled the jury such that the defendants would be prejudiced." Id.

Here, Watson's main claim of prejudice is based on the following statement made by the Magistrate Judge in describing SEPTA's burden of production: "It is not necessary that the reason be a good one, or even that you believe it to be true." See footnote 3, supra . As noted, Watson argued that this statement implied that SEPTA "could give a reason that was totally fallacious and that could carry the day." (App. 143). Although Watson's argument has some force, we are not ultimately persuaded that a new trial should be ordered. First, the Magistrate Judge's statement, although perhaps capable of misinterpretation, was not literally incorrect. The employment discrimination laws involved here permit an employer to take an adverse employment action for a reason that is not "true" in the sense that it is not objectively correct. For example, if an employer sincerely believes that an employee has stolen company funds and discharges the employee for this reason, the employer should not [**35] be held

liable under the statutes in question just because it turns out that the employee did not steal the funds and that the employer's reason for the discharge was in this sense not "true." Second and more important, the statement related to an issue -- whether SEPTA had met its burden of production -- that the jury was not called upon to decide. The Magistrate Judge told the jury in unmistakable terms that SEPTA had met this burden and that the plaintiff now bore the burden of proving that SEPTA discriminated against her because of her sex. Thus, even if jurors misunderstood the Magistrate Judge's statement, the likelihood of prejudice is not great since the statement was not expressly connected to any question that the jury was required to decide. Considering the charge as a whole, we do not find this statement to amount to reversible error.

4.

Watson also complains that the charge impermissibly implied that sex had to be the sole reason, as opposed to a but-for cause, of the adverse action. She points to the following language in the charge:

> It is the plaintiff 's obligation to prove that sex was the reason for the defendant's action.

(emphasis added). While [**36] this language, taken out of context, might imply an erroneous sole-cause standard -- a standard that we rejected in *Miller, 47 F.3d at 594* -- the charge taken as a whole adequately informed the jury that an impermissible factor need only be a determinative, or but-for cause, of the adverse employment action. We perceive no reversible error in this aspect of the charge.

5.

The Magistrate Judge also erred in another aspect of the sex discrimination instruction, although as with the error we noted above, we decline to vacate the judgment because of it. In Smith, the Court held it to be reversible error to fail to instruct the jurors that "they are entitled to infer, but need not, that the plaintiff 's ultimate burden of demonstrating intentional discrimination by a preponderance of the

evidence can be met if they find that the facts needed to make up the prima facie case have been established and they disbelieve the employer's explanation for its decision." *147 F.3d at 280.* While the Magistrate Judge gave a variant of the Smith charge for the ADA claim, n10 she did not explicitly [*223] reiterate that point in the sex-discrimination charge. See App. 134-35. n11 [**37] This was error in light of Smith.

n10 This portion of the charge reads:

"If you find that Ms. Watson has proven that she was disabled or that she had a record of disability, or that SEPTA regarded her as disabled; that she was a "qualified individual"; that an adverse action was taken with regard to her employment; and you find that Ms. Watson has proven that the reason offered by SEPTA for its treatment of her is a pretext for disability discrimination - then your verdict must be for Ms. Watson, under the ADA." (emphasis added). This is a variant of the proper charge because the emphasized language requires a finding of liability when the jury finds the plaintiff proved the elements of her prima facie case and the jury disbelieves the defendant's proffered non-discriminatory explanation. As we made clear in Smith, however, a jury may, but need not, infer intentional discrimination under these circumstances. *Smith, 147 F.3d at 279.* We need not take any measure other than to note this error because the jury found for SEPTA notwithstanding the error in Watson's favor.

[**38]

n11 The relevant portion of the charge reads:

"By meeting this intermediary burden, the defendant has shifted the burden of persuasion back to the plaintiff, to show, by a preponderance of the evidence, that the reason offered by SEPTA is false, or is a pretext for sexual discrimination. Here, as in the disability determination context, the plaintiff may meet this burden of proof either by persuading you that a

> discriminatory reason more likely than not motivated the defendant or by persuading you that the defendant's proffered explanation is unworthy of belief. In order for the plaintiff to recover under Title 7 and/or PHRA for sex discrimination, she must prove by a preponderance of the evidence that SEPTA intentionally discriminated against her because of her sex. Ultimately, you must decide whether Jacqueline Watson's sex was a determining factor in her going on inactive status. Again, for your purposes, determining factor means that but for the plaintiff's sex, the adverse employment action would not have occurred." (App. 134).

Watson, however, did not preserve an objection [**39] on this ground, and therefore we decline to vacate the judgment. In order to preserve an issue for appeal, counsel must state "distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. P. 51. Here, Watson objected to the inclusion of language regarding the defendant's burden of production but made no reference to the absence of a Smith charge. Watson's attorney did say the following:

> All of the cases that deal with pretext ... say that my obligation is to either prove by affirmative evidence that there was discrimination or demonstrate that the--the reason given was not true. If that's the case, Your Honor, then if initially they had no burden of telling the truth [with respect to the legitimacy of the non-discriminatory explanation], then there wouldn't be that additional responsibility on my part to sustain that burden.

(App. 148); see also (App. 92-93) (objection to language regarding SEPTA's intermediate burden of production). But these statements cannot fairly be said to have put the Magistrate Judge on notice of the issue with respect to which it erred. Cf. *Smith, 147 F.3d at 275-76* (plaintiff requested instruction that [**40] jury "could infer intentional discrimination if it found the Borough's reasons for not renewing the contract to be false or not credible").

Because the error identified by Watson for the first time on appeal was neither fundamental nor highly prejudicial, and because we do not perceive a miscarriage of justice in the absence of vacatur and remand, we decline to vacate the judgment based on the error in the District Court's jury instruction.

B.

Both parties also object to the Magistrate Judge's award of partial attorney's fees and costs to Watson. SEPTA argues that, because the jury returned a verdict in its favor, Watson was not the "prevailing party" under the attorney's fee provision of Title VII. *42 U.S.C. § 2000e-5*(k) (court may award reasonable attorney's fees and costs to "the prevailing party" under Title VII). Watson argues that her reinstatement to the mail run position was causally related to the litigation and constituted meaningful relief. SEPTA contends, in turn, that reinstatement to the mail run [*224] position was not the relief Watson sought in this suit. Rather, SEPTA maintains that the relief Watson sought was reinstatement to her "quality [**41] control" job.

We review the amount of the fee award for abuse of discretion. Whether the Magistrate Judge applied the proper standard is reviewed de novo, and we review the Magistrate Judge's factual findings for clear error. See *Rode v. Dellarciprete, 892 F.2d 1177, 1182-83 (3d Cir. 1990).*

In order to qualify as a "prevailing party," Watson was required to show that she achieved relief and that there was a causal connection between the litigation and the relief. See *Wheeler by Wheeler v. Towanda Area Sch. Dist., 950 F.2d 128, 131 (3d Cir. 1991).* ("As long as a plaintiff achieves some of the benefit sought in a lawsuit, even though the plaintiff does not ultimately succeed in securing a favorable judgment, the plaintiff can be considered the prevailing party for purposes of a fee award."); see also *Clark v. Township of Falls, 890 F.2d 625, 627 (3d Cir. 1989)* ("If plaintiffs could establish that their suit was the catalyst for the changes, they were entitled to

prevailing party status despite the fact that the district court had ruled against them.").

The Magistrate Judge's conclusion that Watson "prevailed" based on her reinstatement to [**42] the mail run position is supported by ample circumstantial evidence. Watson was not returned to her job until after the suit was filed, after SEPTA's motion for summary judgment was denied, and after the Magistrate Judge urged SEPTA to reinstate her. Indeed, SEPTA admitted that its efforts to locate a position within SEPTA that would be acceptable to Watson started in late 1996, after Watson had filed suit. See *Metropolitan Pittsburgh Crusade for Voters v. City of Pittsburgh, 964 F.2d 244, 251 (3d Cir. 1992)* (court should look to "the sequence of events in determining whether a lawsuit is a material factor in bringing about a desired change").

SEPTA also argues that reinstatement to the mail run position was not "relief " because SEPTA did not change the job in any way in response to the lawsuit. The Magistrate Judge's conclusion that reinstatement was relief is not erroneous. As Watson stated in her deposition testimony, she sought to return to SEPTA in any capacity. (Reply at 21; App. 477-78). The fact that she was not reinstated to the quality control position -- a position she admittedly preferred -- does not foreclose recovery of attorney fees since she was reinstated [**43] to a position that addressed the concerns raised by her lawsuit. See *Wheeler, 950 F.2d at 131.*

Watson also argues that the Magistrate Judge erred in reducing the lodestar by two-thirds. The Magistrate Judge found that "the Plaintiff 's limited success in relation to what she initially sought from her suit warranted a reduction in the award of attorneys' fees" by two-thirds. (Because SEPTA did not object to the award of costs, the Magistrate Judge did not reduce the award of costs to Watson.) First, Watson argues that the Magistrate Judge erred by reducing the award sua sponte. See *Bell v. United Princeton Properties, Inc., 884 F.2d 713, 721 (3d Cir. 1989)* (court may not lower award sua sponte). Watson's argument is unpersuasive in light of the fact that SEPTA

urged the Magistrate Judge to award no fees at all. We fail to see how Watson can claim unfair surprise when SEPTA's motion plainly put her on notice regarding the propriety of her fee petition in relation to the limited success she achieved through litigation.

Next, Watson argues that the Magistrate Judge utilized an improper "proportionality" measure to limit fees. In *Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031, 1040 (3d Cir. 1996),* [**44] we held that a "court may not diminish counsel fees in a section 1983 [*225] action to maintain some ratio between the fees and the damages awarded." Here, the Magistrate Judge did not engage in the type of proportionality analysis that we disapproved in Washington. Rather, as expressly permitted by the Supreme Court, the Magistrate Judge adjusted the award in light of Watson's limited success. *Hensley v. Eckerhart, 461 U.S. 424, 440, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983)* ("A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.").

Because the Magistrate Judge did not abuse its discretion in adjusting the award of fees, we decline to disturb her decision on this matter.

III.

For the reasons explained above, we affirm.

APPENDIX B

JACQUELINE WATSON v. SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

CIVIL ACTION NO. 96-1002

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1998 U.S. Dist. LEXIS 14390

August 26, 1998, Decided

August 26, 1998, Filed

DISPOSITION:
[*1] Plaintiff's Motion for a New Trial DENIED.

COUNSEL:
For JACQUELINE WATSON, PLAINTIFF: ALAN B. EPSTEIN, JABLON, EPSTEIN AND WOLF, PHILA, PA USA.

For JACQUELINE WATSON, PLAINTIFF: SCOTT A. BURR, JABLON EPSTEIN, PHILADELPHIA, PA USA.

For SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, (SEPTA), DEFENDANT: KENNETH L. OLIVER, JR., OBERMAYER, REBMANN, MAXWELL & HIPPEL, PHILADELPHIA, PA USA.

For SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, (SEPTA), DEFENDANT: MARJORIE H. GORDON, OBERMAYER REBMANN MAXWELL & HIPPEL LLP, PHILADELPHIA, PA USA.

JUDGES:
M. FAITH ANGELL, UNITED STATES MAGISTRATE JUDGE.

OPINIONBY:
M. FAITH ANGELL

OPINION:

MEMORANDUM AND ORDER

Angell, U.S.M.J.

August 26, 1998

Presently before the Court is Plaintiff's Motion for a New Trial, and Defendant's Opposition thereto. For the reasons contained herein, I will deny Plaintiff's motion.

I. BACKGROUND

The Plaintiff, Jacqueline Watson ("Watson") sued her employer, Southeastern Pennsylvania Transportation Authority ("SEPTA"), alleging sex and disability discrimination in connection with Watson's placement on inactive duty status as of September 20, 1994. Specifically, [*2] Watson alleged in a three count complaint that the conduct of SEPTA employees violated the Civil Rights Act of 1964, *42 U.S.C. § § 2000*(e) *et seq.*, as amended by the Civil Rights Act of 1991 at *42 U.S.C. § 1981*(a)("Title VII"), the Americans with Disabilities Act of 1990, *42 U.S.C. § § 12101 et seq.*, also as amended by the Civil Rights Act of 1991 at *42 U.S.C. § 1981*(a)("ADA"), the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. § § 951 *et seq.*, and the common law of the Commonwealth of Pennsylvania. The District Court granted summary judgment in favor of SEPTA on Plaintiff's claims for retaliation, intentional infliction of emotional distress, and on Plaintiff's claims for punitive damages under Title VII and the ADA. The remaining claims under Title VII, the ADA, and the PHRA proceeded to trial.

A jury trial in this matter commenced on June 15, 1998. On June 18, 1998, the Defendant moved for judgment as a matter of law on Plaintiff's request for punitive damages under the PHRA. The Court granted the Defendant's motion and allowed Plaintiff's remaining claims to go to the [*3] jury. On June 22, 1998, the eight person jury unanimously found in favor of SEPTA on all counts.

On July 2, 1998, Plaintiff filed the instant motion for a new trial, based on allegations of error in the jury instructions. Specifically Plaintiff claims: (1) the Court committed plain error by instructing the jury on the *McDonnell Douglas* burden shifting analysis; (2) the Court committed plain error by instructing the jury that SEPTA may articulate a false reason for its employment decision; (3) the Court committed plain error by charging the jury that the Plaintiff had a burden of proving that sex was a determinative factor in SEPTA's employment decision; and (4) the Court committed plain error by granted a judgment as a matter of law on Plaintiff's punitive damages claim.

II. THE LEGAL STANDARD FOR GRANTING A NEW TRIAL.

Federal Rule of Civil Procedure 59(a) provides in pertinent part, that:

"[...] A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States [*4] [...]" Fed.R.Civ.Pro. 59(a).

When considering a motion for a new trial, the evidence and reasonable inferences must be viewed in the light most favorable to the prevailing party. The authority to grant a new trial rests within the sound discretion of the trial court. The trial court has a duty to ensure that the verdict does not result in a miscarriage of justice. The court must not interfere with the verdict unless it is quite clear that the jury

has reached a seriously erroneous result. *Rabinowitz v. Thomas Jefferson University Hospital, 1993 U.S. Dist. LEXIS 13145, CA No. 92-3088, 1993 WL 274016* at *2 (E.D. Pa. July 7, 1993)(citations omitted).

When a new trial is requested based on allegations of errors in the charge to the jury, the scope of review depends upon whether the party challenging the charge properly preserved her objections before the trial court. *Smith v. Borough of Wilkinsburg, 147 F.3d 272, 1998 WL 324608* at *2 (3d Cir. 1998).

Under Rule 51 of the Federal Rules of Civil Procedure, "no party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury [*5] retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed.R.Civ.Pro. 51. By requiring parties to object with specificity before the jury retires, the rule ensures that the trial court is made aware of and given an opportunity to correct any alleged error in the charge before the jury begins its deliberations. The failure to object to an improper instruction normally waives any error in the instruction. *See Id.*

Where an objection is properly preserved, the trial court reviews the alleged error in the jury instructions to "determine whether, if taken as a whole, they properly apprised the jury of the issues and the applicable law ... The charge, taken as a whole and viewed in light of the evidence, must fairly and adequately submit the issues in the case to the jury." *Rabinowitz, 1993 WL 274016* at *4 (E.D. Pa. July 7, 1993)(*quoting Tigg Corporation v. Dow Corning Corp., 962 F.2d 1119 (3d Cir. 1992).*

Where no objection is made, errors in instructions will be reviewed only if the error was fundamental or was likely to have been decisive in the jury's verdict. *Id.* at *3. Under this standard [*6] of review, in order to warrant a new trial the error must rise to the level of "fundamental and highly prejudicial or if the instructions are such that the jury is without adequate guidance on a fundamental question and our failure to consider the error would result in a miscarriage of

justice." *Smith, 147 F.3d 272, 1998 WL 476219* at *8 (3d Cir. 1998)(*quoting Fashauer v. New Jersey Transit Rail Operators, 57 F.3d 1269, 1289 (3d Cir. 1995)).*

Under both standards of review, the court looks at the jury instructions as a whole, considering the totality of the instructions, and not individual sentences or paragraphs in isolation. *Limbach Co. V. Sheet Metal Workers Int'l Ass'n, 949 F.2d 1241, 1259 n.15 (3d Cir. 1991). See In re Braen, 900 F.2d 621, 626 (3d Cir. 1990), cert. denied 498 U.S. 1066, 112 L. Ed. 2d 845, 111 S. Ct. 782 (1991).*

III. ANALYSIS.

A. The Alleged *McDonnell Douglas* Error.

In her first allegation of jury instruction error, Plaintiff argues that I improperly incorporated the *McDonnell Douglas* "burden shifting analysis" into the instructions read to the jury at the [*7] close of trial. n1

> n1 The Third Circuit's opinion in *Smith* indicated in a footnote that a jury instruction involving the "technical aspects of the *McDonnell Douglas* burden shifting" approach may be unduly confusing and irrelevant to the jury. *Smith, 147 F.3d 272, 1998 WL 324608* at *10 n.4 (3d Cir. 1998). However, the *Smith* case did not address the issue before this Court, wherein the *prima facie* elements of disability and sex discrimination remained at issue for the jury to decide. This distinction is material.

Plaintiff did object to the use of the *McDonnell Douglas* analysis at a charging conference held on June 19, 1998. Thus, the scope of review is whether the jury instructions as a whole properly apprised the jury of the issues and the applicable law. n2

> n2 At the charging conference, Plaintiff took the position that a *prima facie* analysis should not be included in the jury instructions. Plaintiff argued "once you get past the motions

for summary judgment and once you get past the analysis that the Court has to do for a Rule 50 motion, this shifting burden analysis is out of the case. And, the jury has to answer the singular question, did they meet the statutory guideline in that she was discriminated against because of her sex or her disability?" N.T. 6/19/98 at 166.

[*8]

In reviewing the *McDonnell Douglas* framework, the First Circuit indicated that the tripartite formula was at first "considered complicated and cumbersome," however, "with repeated use courts have become more comfortable with it, both for their own use in ruling on Title VII claims and for the jury's use in ruling on intentional discrimination." *Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 200 (1st Cir. 1987).* The *Rowlett* Court went on to describe the use of the full tripartite formula in jury instructions as "a straightforward way of explaining how to consider whether there is intentional discrimination in situations where such discrimination is not likely to be overt." *Id.*

Other Circuits have endorsed jury instructions which have made use of the full tripartite burden shifting analysis. *See e.g., Gafford v. General Electric Co., 997 F.2d 150, 167 (6th Cir. 1993)*(holding that "the district court did not commit reversible error by guiding the jury through a three-stage order of proof as opposed to instructing the jury solely on the ultimate issue of sex discrimination"). *See also Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130 (4th Cir. 1988)* [*9] and *Messina v. Kroblin Transp. Sys., Inc., 903 F.2d 1306, 1309 (10th Cir. 1990).*

In the instant case, I incorporated the elements of the *McDonnell Douglas* burden shifting approach because there were unresolved issues of fact properly left to the discretion of the jury regarding the *prima facie* elements of both disability and sex discrimination. The jury charge did not make use of the phrase "*prima facie* case" or other unnecessary technical legal jargon. Instead, the framework of *McDonnell Douglas* was applied in simplified terms.

With regard to the issue of disability discrimination, I believe that questions as to whether the Plaintiff proved by a preponderance of the evidence that she was disabled under the language of the ADA, has a record of disability, or was regarded as disabled by SEPTA, are matters which were properly left to the province of the jury as fact finders. Plaintiff's own counsel stated during the course of trial that she was not disabled, and was not claiming to be disabled. *See* N.T. 6/17/98 at 4. Material issues of fact remained in dispute at the close of the Defendant's, case regarding whether any employees at SEPTA may have [*10] regarded Plaintiff as disabled.

Based on the evidence of record, I also find that reasonable people could differ with regard to the question of whether Plaintiff was a "qualified individual" for a position as a SEPTA mail run operator. The testimony of witnesses was in dispute concerning whether Plaintiff, at the time that she went on inactive duty status, could perform the functions of her position as a mail run operator, even with a reasonable accommodation.

Dr. Kathie Gares, a physician in SEPTA's medical department, testified that she explained to Plaintiff that the mail run operator position being offered to her would allow Plaintiff to refrain from lifting more than twenty pounds, and would allow her to refrain from sitting for a prolonged period of time. *See* N.T. 6/18/98 at 84-88. *See also* Defendant's Exhibit 12 and Plaintiff's testimony, N.T. 6/16/98 at 125. Plaintiff testified that when she attempted to perform the duties of the mail run operator position on September 18-19, 1994, with a twenty pound weight restriction in place, and with periodic stops to allow her to stretch, she still experienced pain as a result of her work. *See* N.T. 6/16/98 at 132. Plaintiff [*11] informed Dr. Gares that she was experiencing pain as a result of going out on the mail run assignment, despite the weight and prolonged sitting restrictions. N.T. 6/16/98 at 133. Dr. Gares testified that she believed the fair thing to do for Plaintiff, based on her complaints of pain, was to not "send her back to a job that she told me would cause her pain." N.T. 6/16/98 at 122.

There is no dispute that Plaintiff was eventually able to perform the requirements of the position, since she was placed in the mail run operator position upon reinstatement to active duty status at SEPTA in 1997. However, there is evidence of record upon which the jury could have concluded that in September of 1994, Plaintiff was unable to perform the duties of a mail run operator, even with the accommodations afforded to her, and, thus, that she was not a qualified individual.

As to Plaintiff's sex discrimination claim, the determination of whether she suffered any adverse employment action based on actions by SEPTA was sent to the jury. n3 Testimony and documentary evidence regarding Plaintiff's placement on inactive duty status was markedly contradictory. Plaintiff alleged that SEPTA placed her on inactive [*12] duty status. However, SEPTA employees, including Dr. Gares, testified that upon Plaintiff's complaints of low back pain and numbness in her left leg, she went on inactive duty status pursuant to a note from SEPTA's medical department. N.T. 6/18/98 at 122. The note instructed Plaintiff that she was "not to work until further notice by her LMD." The jury was informed that "LMD" means local medical doctor. *See* N.T. 6/18/98 at 122. As such, SEPTA contends that Plaintiff would. have been permitted to return to work at any time that she was certified by her own doctor as being able to work. Based on the evidence presented at trial, the jury could have reasonably determined, consistent with SEPTA's representation that it did not place Plaintiff on inactive duty status, that Dr. Gares and the SEPTA medical department were simply looking out for Plaintiff's well-being based on her complaints of pain and numbness as a result of the duration of driving time involved in the mail run operator position.

> n3 Plaintiff admits that this element of the *prima facie* case remained at issue at the close of the case. *See* Plaintiff's Memorandum of Law in Support of Her Motion for a New Trial at p. 10, n. 4.

[*13]

Ultimately, I find that the jury instructions considered as a whole were clear about the jury's ultimate fact-finding mission. n4 As the full tripartite analysis was necessary because *prima facie* elements of the plaintiff's case remained at issue, the jury instructions regarding the *McDonnell Douglas* burden shifting analysis properly apprised the jury of the issues and the applicable law. I will, therefore, deny Plaintiff's request for a new trial on this basis.

n4 The substantive portion of the charge given to the jury is set forth at N.T. 6/22/98 at 93-103.

B. The Alleged "False Reason" Error.

In her second allegation of jury instruction error, Plaintiff argues that the charge given improperly advised the jury "that SEPTA was not required to provide the 'true' reason for its employment decision and failed to advise the jury that if they did not believe SEPTA's articulated reason for its employment decision the jury could infer that the 'true' reason was sex and/or disability discrimination." Specifically, [*14] Plaintiff focuses on the following portions of the charge:

> "The defendant in this case has articulated a legitimate nondiscriminatory reason for placing Mrs. Watson on inactive status. By doing so, the defendant has met its burden of producing some explanation of its actions other than discrimination. It is not necessary that the reason be a good one, or even that you believe it is true. All the defendant need do is state a reason other than a perception that the plaintiff was disabled [the plaintiff's sex] to explain its actions. It is the plaintiff's obligation to prove that a perceived disability [the sex] was the reason for the defendant's action. [emphasis added by Plaintiff]" N.T. 6/22/98 at 99 and 102.

See Plaintiff's Memo in Support of New Trial at 15.

As a threshold matter, I believe the quoted language must be viewed in context in order to get a clear view of the instructions given to the jury. On the disability claim, I gave the jury the following instructions:

> "[...] If you find that the plaintiff has proved that she was disabled, has a record of disability or was regarded as disabled by SEPTA, then you must additionally consider whether [*15] the plaintiff has proven that she is otherwise qualified to perform the essential functions of her job with or without a reasonable accommodation, and you must consider whether the plaintiff has suffered adverse employment action because of her disability.
>
> If all three of these conditions have been met, your analysis does not end there. The defendant in this case has articulated a legitimate nondiscriminatory reason for placing Mrs. Watson on inactive status. By doing so, the defendant has met its burden of producing some explanation of its actions other than discrimination. It is not necessary that the reason be a good one or even that you believe it to be true. All the defendant need do is state a reason other than a perception that the plaintiff was disabled to explain its actions.
>
> It is the plaintiff's obligation to prove that a perceived disability was the reason for defendant's action. By meeting this intermediary burden, the defendant has shifted the burden of persuasion back to the plaintiff to show by a preponderance of the evidence that the reason offered by SEPTA is false or a pretext for disability discrimination. The plaintiff may meet this burden of proof either [*16]

by persuading you that a discriminatory reason more likely than not motivated the defendant, or by persuading you that defendant's proffered explanation is unworthy of belief.

If you find that Mrs. Watson has proven that she was disabled, or that she had a record of disability, or that SEPTA regarded her as disabled, that she was a qualified individual, that an adverse action was taken with regard to her employment, and you find that Mrs. Watson has proven that the reason offered by SEPTA for its treatment of her is a pretext for disability discrimination, then your verdict must be for Mrs. Watson under the ADA.

Ultimately, the question that you must answer to yourselves is whether the plaintiff's disability, record of disability, or her being regarded as disabled, served as a determining factor for SEPTA as to Jacqueline Watson going on inactive status. The phrase 'determining' factor means that but for the plaintiff's disability, record of disability, or her being regarded as disabled, the adverse employment action would not have occurred." N.T. 6/22/98 at 98-100.

Similarly, on the sexual discrimination claim, I gave the jury the following instructions:

"[.. [*17] .] To meet her burden of proving that she was discriminated against by SEPTA on the basis of sex under Title 7 or the PHRA, the plaintiff must prove by a preponderance of the evidence that she was qualified for a position of employment at SEPTA, that despite being qualified she suffered adverse employment consequences that give rise to an inference of sex discrimination.

If the Plaintiff fails to prove any of these elements, then your verdict must be for the defendant. If, however, the plaintiff proves all of these elements, then your analysis does not end there.

The defendant in this case has articulated a legitimate nondiscriminatory reason for placing Mrs. Watson on inactive status. By doing so, the defendant has met its burden of producing some explanation of its actions other than discrimination. It is not necessary that the reason be a good one or even that you believe it is true. All the defendant need do is state a reason other than the plaintiff's sex for its actions. It is the plaintiff's obligation to prove that the sex was the reason for the defendant's action.

By meeting this intermediary burden, the defendant has shifted the burden of persuasion back to [*18] the plaintiff to show by a preponderance of evidence that the reason offered by SEPTA is false or a pretext for sexual discrimination. Here, as in the disability determination context, the plaintiff may meet this burden of proff either by persuading you that a discriminatory reason more likely than not motivated the defendant or by persuading you that the defendant's proffered explanation is unworthy of belief.

In order for the plaintiff to recover under Title 7 and/or PHRA for sex discrimination, she must prove by a preponderance of evidence that SEPTA intentionally discriminated against her because of her sex. Ultimately, you must decide whether Jacqueline Watson's sex was a determining factor in her going on inactive status. Again, for your purposes, determining factor means that but for the plaintiff's

sex, the adverse employment action would not have occurred. [...]" N.T. 6/22/98 at 101-103.

During the charging conference on June 19, 1998, the Defendant challenged the above jury instructions, arguing that under the *Hicks* test, the mere fact that the Defendant's articulated reason was false isn't enough to meet Plaintiff's burden of proof to show a discriminatory [*19] reason. Defendant requested the following additional language:

> "[...] If all three of these conditions have been met, your analysis does not end there. The defendant in this case has articulated a legitimate nondiscriminatory reason for placing Mrs. Watson on inactive status. By doing so, the defendant has met its burden of producing some explanation of its actions other than discrimination. It is not necessary that the reason be a good one or even that you believe it to be true. All the defendant need do is state a reason other than a perception that the plaintiff was disabled to explain its actions.
>
> It is the plaintiff's obligation to prove that a perceived disability was the reason for defendant's action. By meeting this intermediary burden, the defendant has shifted the burden of persuasion back to the plaintiff to show by a preponderance of the evidence that the reason offered by SEPTA is false or a pretext for disability discrimination. The plaintiff may meet this burden of proof either by persuading you that a discriminatory reason more likely than not motivated the defendant, or by persuading you that defendant's proffered explanation is unworthy of belief [*20] **[and that the real reason for its action is discrimination]**."

In response to the Defendant's request for additional language, the Plaintiff again argued that the *prima facie* analysis should not be included in the jury charge. However, he made no objection to the specific language used.

I declined to include the additional language requested by the Defendant.

The Plaintiff made no objection to the language of the *prima facie* instructions until after the jury was charged on June 22, 1998. After the jury retired to deliberate, Plaintiff, for the first time, argued that the charge improperly allowed the jury to find for the Defendant even if they did not believe the articulated reason for its actions. Plaintiff cited no authority for his position. According to Plaintiff, the following language should have been deleted:

> "The defendant in this case has articulated a legitimate nondiscriminatory reason for placing Mrs. Watson on inactive status. By doing so, the defendant has met its burden of producing some explanation of its actions other than discrimination. It is not necessary that the reason be a good one **or even that you believe it to be true**. All [*21] the defendant need do is state a reason other than a perception that the plaintiff was disabled to explain its actions."

After noting the parties' exceptions to the charge as given, we recessed to await the jury's decision. Upon returning to my chambers, as is my practice, I began reviewing slip opinions. I was surprised to find, among the stack of opinions, the *Smith* decision in which the Third Circuit, by opinion dated June 17, 1998, held that "jurors must be instructed that they are entitled to infer, but need not, that the plaintiff's ultimate burden of demonstrating intentional discrimination by a preponderance of the evidence can be met if they find that the facts needed to make up the *prima facie* case have been established

and they disbelieve the employer's explanation for its decision." *Smith, 147 F.3d 272, 1998 WL 324608* at *8 (3d Cir. June 1998).

I then queried Plaintiff's Counsel on the record as to the basis of his objection to the "or even that you believe it to be true" language. At that point, Counsel conceded that he had raised the issue for the first time after the charge was given. Counsel asserted that while the objectionable language [*22] was in the proposed instructions handed to him on June 19, 1998 (and which were the subject of the charging conference on the same date), he only noticed the language on the way to Court after reviewing the proposal instructions which I faxed to his office on Sunday, June 21, 1998. *See* N.T. 6/22/98 at 115-18. n5 When asked what authority he relied upon, Plaintiff's Counsel argued "[...] all of the cases that deal with pretext, including *Hayes* and *Paper* and others, say that my obligation is to either prove by affirmative evidence that there was discrimination or demonstrate that the -- the reason given was not true. If that's the case, Your Honor, then if initially they had no burden of telling the truth, then there wouldn't be that additional responsibility on my part to sustain that burden. And that's where I get it from." N.T. 6/22/98 at 116. n6

n5 I am confused by Plaintiff's statement in her motion for a new trial that: "despite plaintiff's counsel's repeated objections to the Court's jury instructions and the Third Circuit's clear pronouncement in *Smith*, the Court nevertheless did not give a curative instruction to the jury." Plaintiff's Memo in Support of New Trial at 18 n.6. [*23]

n6 I note that the *Smith* Court was of the opinion that the rule it announced had not yet been addressed by the Third Circuit. *Smith, 147 F.3d 272, 1998 WL 324608* at *7 (3d Cir. 1998).

When asked whether he was familiar with the *Smith* decision, Plaintiff's counsel denied seeing it. Counsel initially noted that he usually got slip opinions at the same time as the Court, and then stated that he didn't get slip opinions, that he only had access to slip opinions

through the Villanova service, which doesn't have them until several days after the Third Circuit decides. Counsel opined that his office had probably received the *Smith* opinion over the weekend, but represented that he was only in the office for 15 minutes prior to leaving for Court on June 22, 1998.

After hearing the Plaintiff's new objection, and based upon my reading of *Smith*, I considered giving a curative instruction, but ultimately declined to do so, as jury deliberations had been underway for some time.

In her motion for a new trial, Plaintiff focuses on different language in support of her argument [*24] that the charge erroneously failed to advise the jury that if they did not believe SEPTA's articulated reason for its employment decision, the jury could infer that the true reason was sex and/or disability discrimination. In this motion, Plaintiff claims that the improper language is:

> "a good one, or even that you believe it is true. All the defendant need do is state a reason other than [a perception that the plaintiff was disabled to explain its actions/plaintiff's sex for its actions]. It is the plaintiff's obligation to prove that [a perceived disability/sex] was the reason for the defendant's action. [emphasis added by Plaintiff]" *See* Plaintiff's Memo in Support of New Trial at 15.

In support of this allegation of error, Plaintiff relies, *inter alia*, on the *Smith* case for the proposition that: "it is plain error for a district court not to instruct a jury that if it disbelieves the employer's asserted reason for its employment decision that it could infer that the true reason was intentional discrimination. [emphasis in original]." *See* Plaintiff's Memo in Support of New Trial at 17.

As the above background shows, Plaintiff has clearly [*25] waived her objection to the challenged pretext instructions. Thus, the standard of review is whether the alleged error, when viewing the jury

instructions as a whole, rises to the level of fundamental error. It order to justify the grant of a new trial, I must find that the jury was left without adequate guidance on a fundamental question, namely what it was entitled to do or infer once the jurors had decided to disbelieve the employer's proffered reason. *See Smith, 147 F.3d 272, 1998 WL 324608* at *8 (3d Cir. 1998). n7

> n7 The *Smith* Court found that plaintiff had properly preserved the issue by filing a timely objection. Thus the scope of review was "whether the charge, 'taken as a whole, properly apprises the jury of the issues and the applicable law.'" *Smith, 147 F.3d 272, 1998 WL 324608* at *2 (3d Cir. 1998).

Viewing the instructions given as a whole, I conclude that the pretext error does not rise to the level of fundamental error. Plaintiff is correct in suggesting that [*26] it would have been better to delete the phrase "or even that you believe it is true" from the pretext instructions. However, this language was included in my discussion of the Defendant's "intermediary burden". The jurors were instructed that in order to meet its burden of producing some explanation of its actions other than discrimination, the Defendant had to state some reason, even if the reason wasn't a good one or the jurors did not believe it. Once the Defendant articulated some nondiscriminatory reason, the jurors were instructed that the burden of persuasion shifted back to the Plaintiff to show by a preponderance of the evidence that the "reason offered by SEPTA is false or a pretext for sexual [disability] discrimination." The jury charge instructed the jurors that Plaintiff could meet her burden of proof "either by persuading you that a discriminatory reason more likely than not motivated the defendant, **or by persuading you that the defendant's proffered explanation is unworthy of belief.**"

While the charge given does not specifically include the "inference" language approved by the Third Circuit in *Smith*, I find that the charge meets the *Smith* requirement [*27] in that the jury was told that it was permitted but not required to find intentional

discrimination if it found that Plaintiff had proven the elements of her *prima facie* case and if it disbelieved SEPTA's explanation for its actions. *See Smith, 147 F.3d 272, 1998 WL 324608* at *10 (3d.Cir. 1998).

C. The Alleged "Determining Factor" Error.

In her third allegation of jury instruction error, Plaintiff argues that the Court erred in instructing the jury that the Plaintiff had the burden of proving that sex was "a determining factor" in SEPTA's employment decision. Plaintiff contends that the phrase "a motivating factor" should have been substituted for the phrase "determining factor", based on the Congressional enactment of the Civil Rights Act of 1991 ["1991 Act"], *42 U.S.C. § 1981a,* which amended § 703 of the Civil Rights Act of 1964, *42 U.S.C. § 2000e-2.* n8

> n8 Because Plaintiff properly preserved her objection to the use of the "determining factor" language at the charging conference, the scope of review is whether the jury instructions as a whole properly apprised the jury of the issues and the applicable law. *See* N.T. 6/19/98 at 128-41.

[*28]

Section 107 of the 1991 Act reads as follows:

> "(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." *42 U.S.C. § 2000e-2*(m).

The Congressional amendment set forth in *42 U.S.C. § 2000e-2*(m) of the 1991 Act was enacted following the United State Supreme Court's decision in *Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989).*

The Third Circuit has expressly left open the question of whether "a determinative effect" instruction is appropriate in a pretext case following the 1991 Act. *Woodson v. Scott Paper Co., 109 F.3d 913* (3d Cir.), *cert denied 139 L. Ed. 2d 230, 118 S. Ct. 299 (1997); Hook v. Ernst & Young, 28 F.3d 366, 368, 371 (3d Cir. 1994).*

In a case handed down on August 18, 1998, the First Circuit declined to "enter this thicket at the moment", noting "the controversy [*29] that exists over whether the 'a motivating factor' language in *42 U.S.C. § 2000e-2*(m) applies to all discrimination cases, as the language indicates, or was intended only to overrule in part the standard set forth in *Price Waterhouse v. Hopkins*. [citations omitted]." *Carey v. Mt. Desert Island Hospital, 156 F.3d 31, 1998 U.S. App. LEXIS 21290, 1998 WL 472058* at *8 (1st Cir. August 18, 1998).

Recognizing that "courts have struggled for decades to develop and refine an evidentiary framework" in the field of employment discrimination, and that the specific question before me has not been addressed by the Third Circuit which characterizes the issue as "far from clear", I reject Plaintiff's contention that the 1991 Act prohibits "a determinative effect" instruction in a pretext case. *See Woodson v. Scott Paper, 109 F.3d at 935 n.29 (3d Cir. 1997).*

I find the analysis in the *Carey* dissent persuasive. Judge Stahl rejected the majority's assumption for the purposes of analysis that the district court erred in charging the jury that plaintiff had the burden of showing by a preponderance of the evidence that "gender [*30] was a motivating factor" in Defendant's decision to fire Plaintiff. Judge Stahl felt it important to explain why the charge was erroneous and prejudicial, concluding that the court had erroneously understated the plaintiff's burden of proof by assuming *arguendo* that the 1991 Act applied to pretext cases. In comparing the "a motivating factor" rubric of the 1991 Act with the established understanding of the plaintiff's burden of proof in the *McDonnell Douglas* framework, Judge Stahl opined that the two were conceptually incompatible. According to Judge Stahl "proving that discrimination was just one

motivating factor among other nondiscriminatory factors--which is all that is required to prove liability under § 2000e-2m [of the 1991 Act]--cannot suffice to establish that the discriminatory motive was causally determinative, and hence cannot be enough to establish liability and a right to recovery under *McDonnell Douglas*." *Carey, 156 F.3d 31, 1998 WL 472058* at *14 (1st Cir. August 18, 1998)(dissenting opinion).

To resolve the apparent conflict between the 1991 Act and the *McDonnell Douglas* framework, Judge Stahl advocated limiting application of the [*31] 1991 Act to "mixed motive" cases that fit the *Price Waterhouse* mold (where there is direct evidence of discrimination) and holding the 1991 Act inapplicable in pretext cases governed by *McDonnell Douglas*. *Id.* at *15 (1st Cir. August 18, 1998)(dissenting opinion).

Fortunately, I do not have to decide this murky question. However, because it is my belief that the "determinative factor" instructions, viewed in the context of the charge as a whole, were appropriate in this pretext case, I will deny the motion for a new trial. *See Smith, 147 F.3d 272, 1998 WL 324608* at *6 (3d Cir. 1998)(characterizing the *McDonnell Douglas* burden shifting framework as follows: "If the plaintiff establishes the elements of a *prima facie* case, the employer must articulate a legitimate, non-discriminatory reason for its employment decision. Once such a justification is proffered, the burden then reverts to the plaintiff to prove by a preponderance of the evidence that the articulated reason is a pretext. At all times, the plaintiff bears the ultimate burden of proving that discrimination (here age) **was a determinative factor** in the adverse employment decision. [*32]).

D. The Alleged "Punitive Damages" Error.

In her final allegation, Plaintiff argues that I erred in granting SEPTA's motion for judgment as a matter of law with respect to Plaintiff's claims for punitive damages under the PHRA and the Civil Rights Act of 1991. n9 According to Plaintiff, the evidence in this

case was sufficient to instruct the jury about the possibility of making a punitive damage award against SEPTA.

> n9 As noted above, Plaintiff's only remaining punitive damages claim arose under PHRA, as summary judgment was granted in favor of the Defendant on the punitive damages claims under Title VII and the ADA.

At the close of Plaintiff's case, the Defendant had moved for judgment as a matter of law on the remaining punitive damages claim. I granted the Defendant's motion, finding that there was not sufficient evidence of reckless indifference for the issue to go to the jury.

Review of the grant of a judgment as a matter of law is "whether, as a matter of law, the record is critically deficient [*33] of that minimum quantum of evidence from which a jury might reasonably afford relief." *Woodson v. AMF Leisureland Centers, Inc., 842 F.2d 699, 703 (3d Cir. 1988).*

Assuming *arguendo* that punitive damages are recoverable under the PHRA, punitives may be awarded where the defendant's conduct "is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." Punitive damages are appropriate only "where the conduct complained of is especially egregious." *Oliver v. Bell Atlantic, 1994 U.S. Dist. LEXIS 8891, 1994 WL 315823* (E.D. Pa. June 30, 1994)(*quoting Martin v. Johns-Manville Corp., 508 Pa. 154, 494 A.2d 1088, 1096 (Pa. 1985)), aff'd in part, den'd in part 60 F.3d 816 (3d Cir. 1995).* n10

> n10 While some courts in this District have permitted punitive damage claims to remain in PHRA actions (*See Woodson v. Scott Paper, 109 F.3d at 932 n.20 (3d Cir. 1997)),* this state law question has not yet been ruled upon by the Supreme Court of Pennsylvania. At least one district court has disallowed punitive damages under the PHRA, predicting that the state Supreme Court would not allow punitive damages in a PHRA case. *Goodwin v. Seven-Up Bottling Co.,*

1998 U.S. Dist. LEXIS 11852, 1998 WL 438488, slip op. at *2 (E.D. Pa. July 31, 1998).

[*34]

Because I continue to believe, viewing the evidence in the light most favorable to the Plaintiff, that there is insufficient evidence of "especially egregious conduct" to support a punitive damages award, I will deny Plaintiff's motion for a new trial based on alleged error in declining to place this issue before the jury.

An appropriate Order follows.

ORDER - Entered: 8-27-98

AND NOW, this 26th day of August, 1998, upon consideration of Plaintiff's Motion for a New Trial, and the Defendant's opposition thereto, it is hereby **ORDERED** that Plaintiff's Motion for a New Trial is **DENIED**.

BY THE COURT:

M. FAITH ANGELL

UNITED STATES MAGISTRATE JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

98-1832/1833/1834

JACQUELINE WATSON,

Appellant/Cross-Appellee,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY ("SEPTA"),

Appellee/Cross-Appellant.

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge,, SLOVITER, MANSMANNN, GREENBERG, SIRICA, NYGAARD, ALITO, ROTH, McKEE and BARRY, Circuit Judges, and ACKERMAN, Senior District Judge**

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority

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*As to panel rehearing only.

of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

Samuel A. Alito, Jr.
Circuit Judge

Dated: August 31, 2000